

No. 17387

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United States  
Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA,

Appellant,

vs.

CHARLES E. AND LOIS ROSEBROOK,

Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California,  
Southern Division

FILED

JUL 20 1961



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

LAURENCE E. DAYTON,  
U. S. Attorney,  
Northern District of California.

Attorney for Appellee:

JANIN & MORGAN,  
1920 Mills Building,  
San Francisco 4, California.





In the United States District Court for the  
Northern District of California,  
Southern Division

Civil Action

No. 38765

CHARLES E. and LOIS ROSEBROOK, Husband  
and Wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

### COMPLAINT

To the Honorable Judges of the Above Entitled Court:

Plaintiffs bring this action against the United States for the recovery of income taxes illegally and erroneously assessed and collected from plaintiffs and allege as follows:

#### I

Plaintiffs are citizens of the United States and residents of San Mateo County, California; jurisdiction is conferred upon this Court by 28 U.S.C. §1346(a)(1). The plaintiffs' claim does not exceed \$10,000.00 and arises under the Internal Revenue laws of the United States, as hereinafter more fully appears.

#### II

Plaintiffs' suit is brought for the recovery of \$303.72 of income taxes illegally and erroneously assessed to and collected from plaintiffs for the calendar year 1955, together with interest thereon from April 15, 1956, to

the date of payment, September 28, 1959, in the amount of \$59.37.

### III

Plaintiffs duly filed their income tax return for the calendar year 1955 with the District Director of Internal Revenue, San Francisco, California, and paid the full amount of tax shown to be due upon the return on a date no later than April 15, 1956.

### IV

Thereafter the Commissioner of Internal Revenue caused the aforesaid return of the plaintiffs for the year 1955 to be examined and as a result of said examination determined that plaintiffs had additional ordinary income of \$2,056.91 for the year 1955, but that plaintiffs overreported capital gains in the amount of \$1,-028.45 for a net increase in taxable income of \$1,-028.45. He determined that plaintiffs owed additional tax because of the aforesaid adjustment in the amount of \$303.72 and that they owed interest on the above deficiency in the amount of \$52.62 or a total income tax and interest in the amount of \$363.09.

### V

In making the aforesaid adjustments to taxable income as reported on the returns of the plaintiffs, the Commissioner of Internal Revenue determined that amounts received by the taxpayers and reported as capital gains in the amount of \$1,028.45 was not gain on the sale of a capital asset, but represented ordinary income from the installment sale of an undivided interest in real property to customers in the ordinary course of

taxpayers' trade or business in the amount of \$2,056.91. The entire amount of the deficiencies resulted from the aforesaid adjustments by the Commissioner.

## VI

Thereafter on or about September 28, 1959, pursuant to assessment and demand for payment, plaintiffs paid the sums of \$303.72 tax and \$59.37 interest to the Internal Revenue Service, sending them to the District Director of Internal Revenue for the district of San Francisco.

## VII

Thereafter on or about September 29, 1959, claims for refund for the plaintiffs were filed with the District Director of Internal Revenue, setting forth the taxpayers' demand for refund of principal and interest paid pursuant to said assessment on the theory that the subject interest in land which was sold on an installment sale was not sold to customers in the ordinary course of taxpayers' trade or business, but was a capital asset and gain was properly reportable as capital gain, which claim is consistent with the facts upon which the returns were prepared and filed.

## VIII

Said claim for refund was denied by the Commissioner of Internal Revenue by notice of disallowance sent by registered mail dated December 17, 1959.

## IX

Plaintiffs did not hold the subject interest in land for sale to customers in the ordinary course of trade or business, but held it as capital asset and properly reported gain from said sale as capital gain.

## X

The Commissioner erred in determining that the plaintiffs held such interest for sale in the ordinary course of their trade or business, and by reason of said error has erroneously and illegally assessed against and collected from the plaintiffs and paid into the Treasury of the defendant as income taxes and interest for the year 1955 the amount of \$363.09.

## XI

Although repayment thereof has been demanded, no part of the above-mentioned sum has been credited, remitted, refunded or repaid to plaintiffs and the full amount thereof, together with interest thereon from September 28, 1959, at the rate of one-half per cent per month remains due and owing to the plaintiffs by the defendant.

Wherefore, plaintiffs demand judgment against the defendant in the amount of \$363.09 together with interest thereon from September 28, 1959, at the rate of one-half per cent per month together with costs and disbursements of this action.

/s/ EUGENE J. BRENNER,  
/s/ MELVIN H. MORGAN,  
/s/ HARRY L. FREEMAN.

[Endorsed]: Filed Dec. 18, 1959.

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[Title of District Court and Cause.]

ANSWER

Now Comes the United States of America, the above-named defendant, by its attorney, Lynn J. Gillard, United States Attorney in and for the Northern District of California, and for its answer to the complaint filed herein alleges and says:

Admits the allegations in the first paragraph thereof, except it is denied that any income taxes have been illegally and erroneously assessed and collected from the plaintiffs.

1. Admits the allegations in paragraph I thereof.

2. Admits the allegations in paragraph II thereof, except it specifically is denied that any part of the amounts of \$303.72 and 59.37 was illegally and erroneously assessed to and collected from the plaintiffs or from either of them.

3. Admits the allegations in paragraph III thereof.

4. Admits the allegations in paragraph IV thereof.

5. Admits the allegations in paragraph V thereof.

6. Admits the allegations in paragraph VI thereof.

7. Admits the allegations in paragraph VII thereof.

8. Admits the allegations in paragraph VIII thereof.

9. Denies the allegations in paragraph IX thereof.

10. Denies the allegations in paragraph X thereof.

11. Denies the allegations in paragraph XI thereof, except it is admitted that no part of the sums of \$303.72 tax and \$59.39 interest, paid as alleged in paragraph VI of the complaint which is admitted in this answer, has been credited, remitted, refunded or repaid to the plaintiffs or to either of them.

Wherefore, defendant prays that the complaint filed

herein be dismissed, with costs to be assessed against the plaintiffs.

LYNN J. GILLARD,  
United States Attorney,  
/s/ THOMAS E. SMAIL, JR.,  
Assistant United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 11, 1960.

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[Title of District Court and Cause.]

### PARTIAL STIPULATION OF FACTS

It is hereby stipulated and agreed between the parties hereto, by their respective undersigned attorneys, that the following facts shall be taken as true and received as evidence in said case together with all exhibits attached hereto and made a part hereof; provided, however, that this stipulation does not waive the right of either party to introduce other evidence, not inconsistent with the facts herein stipulated, or to object to the introduction in evidence of the facts or documents herein stipulated on grounds of immateriality or irrelevance.

1. Plaintiff, Lois W. Rosebrook, on February 12, 1955, was married to plaintiff, Charles E. Rosebrook. Previously she was known as Lois Williams or Lois Williams Aull. Plaintiffs, Charles E. Rosebrook and Lois W. Rosebrook, filed a joint tax return for said year with the District Director of Internal Revenue in San Francisco, California. A photostatic copy of taxpayers' return is submitted herewith as a joint exhibit and marked "Exhibit 1-A." Plaintiff, Charles E. Rosebrook, had no interest in the land which is the subject of this proceeding.



2. Plaintiff, Lois W. Rosebrook, in 1955, was the adult daughter of George W. Williams and Hortense Williams.

3. In 1942 George W. and Hortense Williams established a trust for the benefit of their daughter, Lois W. Rosebrook, then a minor, with George W. Williams as sole trustee. The trust acquired assets, including a 1% undivided interest as tenant in common in 1159.6 acres of land in San Bruno, California, which was acquired in May of 1953. A true photostatic copy of the Declaration of Trust creating said trust is attached hereto as a joint exhibit and marked "Exhibit 2-B."

4. On December 18, 1953, the aforesaid trust created for her use and benefit was dissolved and plaintiff, Lois W. Rosebrook, by quitclaim deed, received the 1% interest in 1159.6 acres of real property in San Bruno, California.

5. On dissolution of said trust on December 18, 1953, Lois W. Rosebrook was then 27 years of age, and thereafter held said interest in 1159.6 acres of land previously held for her use and benefit by the above-mentioned trust. A true photostatic copy of said quitclaim deed is attached hereto and marked "Exhibit 3-C."

6. On dissolution of said trust, by three documents each entitled "Assignment" the personal property previously held for her use and benefit by the trust was distributed to Lois W. Rosebrook. True photostatic copies of said assignments are attached hereto and marked "Exhibit 4-D."

7. On dissolution of the trust, by a document entitled "Receipt and Assumption of Liability" plaintiff, Lois W. Rosebrook, accepted the trust property, includ-

ing the aforementioned interest in land. A true photostatic copy of said document is attached hereto and marked "Exhibit 5-E."

8. On or about February 10, 1954, all of the owners of the subject land, including plaintiff, Lois W. Rosebrook, entered into an agreement to convey 884.2 acres of the subject land to a corporation, Consolidated Lands, Inc. A true photostatic copy of said agreement is attached hereto and marked "Exhibit 6-F."

9. On February 10, 1954, the owners by statutory grant deed conveyed the above-mentioned 884.2 acres of said land to Consolidated Lands, Inc. and in payment thereof received a total of \$100,000 cash and an installment note for payment of the balance in the face amount of \$1,668,500 secured by deed of trust. A true photostatic copy of said grant deed is attached hereto and marked "Exhibit 7-G"; a true photostatic copy of said note is attached hereto and marked "Exhibit 8-H"; a true photostatic copy of said deed of trust is attached and marked "Exhibit 9-I."

10. Plaintiff, Lois W. Rosebrook, received \$1,000 in cash and a 1% interest in said note and deed of trust in payment of her interest in said 884.2 acres of land.

Dated: August 23rd, 1960.

/s/ EUGENE J. BRENNER,

/s/ HARRY L. FREEMAN,

Attorneys for Plaintiffs,

LAURENCE E. DAYTON,

United States Attorney,

/s/ By THOMAS E. SMAIL, JR.,

Assistant United States Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 23, 1960.



[Title of District Court and Cause.]

### MEMORANDUM AND OPINION

Plaintiffs, Charles E. and Lois W. Rosebrook,<sup>1</sup> citizens of the United States and residents of San Mateo County, California, bring this suit under 28 U.S.C. Section 1346(a)(1) for a refund of \$303.72 of federal income tax, which they claim was erroneously assessed and collected from them for the year 1955, together with interest assessed thereon in the sum of \$59.37 from April 15, 1956 to the date of payment, September 28, 1959, together with interest thereon at the rate of one-half of 1% monthly since the date of payment.

The question presented to the Court is whether gain on the installment sale of an interest in land is, in the circumstances of this case, capital gain on the sale of a capital asset within the meaning of Internal Revenue Code, 1954, 26 U.S.C. Sec. 1221, 1222, 1202, and regulations to Section 1221, Reg. Sec. 1.1221-1, and as reported by plaintiff taxpayer, or whether such gain, within the meaning of the law and the regulations, is ordinary income from a sale in the ordinary course of a business, as claimed by the Commissioner of Internal Revenue.

The Court finds that the facts are substantially as follows:

For some time prior to 1953, George W. Williams, plaintiff's father, had been attempting to purchase ap-

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<sup>1</sup>Plaintiff, Charles E. Rosebrook, is involved in this case solely by reason of having filed a joint tax return for the year 1955 with his wife, Lois W. Rosebrook.

proximately 1159.6 acres of San Francisco peninsula land owned by the San Bruno Land Company.

He was not able to obtain sufficient financing to make the purchase until 1953 when he interested a group, including himself, Frank Burrows, Andrew Conway, Martin Wunderlich and Thomas Culligan—all of whom were prominent in the real estate subdivision business.

On April 23, 1953, these parties entered into an agreement (Def. Ex. A) whereby they would purchase the stock of San Bruno Land Company, for a total of \$1,150,000, for the purpose of acquiring the 1159.6 acres of land and that after acquisition they would dissolve the corporation and take the land as tenants in common in proportion to their respective contributions.

On the same day they entered into another, separate memorandum (Def. Ex. B) to the effect that the respective tenants in common would hold the land for six months in order to realize a capital gain and then sell it to a development corporation to be formed by the parties for the purpose of developing and subdividing the land, the stock in any such corporation to be issued—one third to Williams and Burrows, one third to Conway & Culligan and one third to Wunderlich. (See Def. Ex. B).

It was understood that these respective parties were acting, not only for themselves, but for other interests represented by them.

Accordingly, on May 7, 1953, the group purchased the capital stock of the San Bruno Land Company. The corporation was immediately liquidated and the land was taken in the name of the group who then quit

claimed it to all contributing interests as tenants in common according to their respective contributions to the purchase price and took back a power of attorney for purposes of management.

Among the contributing interests represented in these transactions by George W. Williams was a certain irrevocable trust which he and his wife had created in 1942 for their daughter, Lois Rosebrook, who is the principal plaintiff in this case. Her father, George W. Williams, was sole trustee. In 1953 there was cash on hand in the trust in the amount of \$10,000. Williams, acting as trustee, contributed \$7,000 on behalf of the trust as part of the contribution of his group to the acquisition of the San Bruno land. In due course, the trust received a conveyance of a 1% interest therein as tenant in common.

On October 28, 1953, Williams, Burrows, Conway, Culligan and Wunderlich, and an outside party, organized Consolidated Land Company for the purpose of subdividing and developing the San Bruno land.

On December 18, 1953, when plaintiff was 28 years of age, the trust was dissolved and all the trust assets, including the 1% interest in the San Bruno land, were transferred by her father as trustee, into her name.

On February 10, 1954, the tenants in common of the 1159.6 acres, sold and conveyed 884.2 acres of the parcel to Consolidated Land Company for a total purchase price of \$1,768,500, payable in \$100,000 cash and an installment note of the corporation for the balance.

Plaintiff, concurring in the suggestion of her father, conveyed her 1% interest to the corporation and received the sum of \$1,000 in cash and a 1% interest in the installment note for the balance.

The Commissioner ruled that the gain on this sale was not a capital gain, but ordinary business income. This ruling was upon the theory, and the Government here contends, that plaintiff, Lois Rosebrook, in fact, held her 1% interest for the same purpose and with the same intent as all others participating in the venture and, further, that even if such was not her intent and purpose, the intent and purpose of her father, and others in the venture would be imputed to her as a matter of law by reason of her participation in it.

Assuming, and finding for the purpose of this case, that George W. Williams, plaintiff's father, trustee and agent, and others in the joint venture held their interests in this land primarily for sale to customers in the ordinary course of their business, it does not necessarily follow that this plaintiff held her 1% interest with the same intent and purpose.

The evidence in this case does not show that either plaintiff or her father, as trustee, agent or otherwise, intended that plaintiff, whose interest was represented by him in the transaction, would have any interest or activity in the proposed development company which was to be the corporate device through which the father and certain other members of the venture, were to develop the land in the ordinary course of their business.

On the contrary, the evidence shows that plaintiff was not to have, and did not ever acquire, any interest in, or take up any activity in, Consolidated Land Company, the development company which was eventually formed by plaintiff's father and other members of the venture for their business purposes.

Plaintiff, and some other represented parties, whose funds were invested in the land, were not to have any interest in Consolidated Land Company. (See, trans. p. 123).

All that plaintiff received for the sale of her 1% interest in the land was a \$1,000 down payment and the balance in accordance with an installment note executed by the corporation. (See, trans. pp. 57-58). She had no further concern with the development of the land for business purposes after the sale of her interest to Consolidated Land Company. She never became a stockholder, officer, director or employee of Consolidated Land Company. (Tr. pp. 40, 58). She knew of no commitments which her father had made for sale of the property to Consolidated Land Company and knew nothing about it. (Tr. p. 53).

Even if her father, as her trustee, invested her trust funds in the land because he knew that it was worth more than it cost, and that a large part of it would eventually be sold at a profit to a development company in the course of his business activities, this would be, as far as plaintiff's interest was concerned, nothing more than an investment in a capital asset with a view to eventual sale at a profit. Indeed, it would have been nothing more than an investment for all members of the venture if that were all there was to it. The situation of others in the venture is differentiated from plaintiff's situation by the fact that they held their interests with a view to eventual disposition through the medium of a development corporation to customers in the ordinary course of their business. The



evidence, however, shows that plaintiff was not in any such situation.

We are of the opinion, therefore, that plaintiff did not acquire or hold her interest in this property for sale in the course of any business of hers, no matter how the transaction may call for a different conclusion with respect to others.

Plaintiff's sale of her 1% interest in this 884 acre parcel of San Bruno lands was the first sale of real estate ever made by her and, with the exception of a subsequent sale in November, 1956, of her 1% interest in an additional 80 acres of the land to Consolidated Land Company for a shopping center, it has been her only sale of real estate.

Nor had the trust created for her by her parents, ever sold a parcel or any interest in real property, although it held, and plaintiff continues to hold, interests in two parcels of real estate.

Plaintiff is not, and never has been a dealer in real estate, has never held a real estate broker's license, is not a member of any partnerships dealing in real estate, has no background or pattern of real estate activity or employment.

She was graduated from Stanford University in 1946 with a Bachelor of Arts degree, major in English. From 1946-1953 she was a housewife, sometimes working as a medical receptionist. From 1953 to 1955 she worked at an auto rental firm, a rug cleaning firm, and briefly for her father as a secretary. Since February, 1955, she has been a housewife and has not been otherwise employed.

The intent and purpose of participants in a joint venture, which contemplates a sale of their respective realty interests to an ultimate purchaser, as in this case the development company, might be quite different one from another. For some it may be just a step in carrying on their business; for others it may be merely a single opportune investment with a view of ultimate profit but unrelated to any business of the participant, as in the case of plaintiff here. In the absence of a true business partnership for the purpose of the transaction, which the Court finds did not exist here, the intent and purposes of the former category are not imputed to the latter category, nor does the situation of the former for tax purposes necessarily determine the situation of the latter.

Even if we assume that the acts of plaintiff's father, as trustee, in making the original investment of trust funds are binding on the beneficiary (See: *Werner v. United States*, 188 F. 2d 26 (9th Cir. 1951)), such rule would not be determinative of this case because of our finding that the father did not in fact commit plaintiff or the trust, to the business purposes existing between himself and certain of the other participants.

We have examined *Bistline v. United States*, 260 F. 2d 77 (9th Cir. 1958), where the trial court's finding that frequent and continuous real estate sales made by a daughter after a purported gift of the properties from her father, a real estate dealer, for tax avoidance purposes, were in fact made by the daughter in the course of a real estate business in joint enterprise with her father.

The case is clearly distinguishable from the instant case on the facts and in the inferences to be reasonably drawn.

Further, as stated by the Court in *Bistline* at 801 quoting from *Stockton Harbor Industrial Co. v. Commissioner*, 216 F. 2d 638, 650 (9th Cir. 1954), "What is and what is not trade or business, and when property is or is not held for sale to customers are questions of fact," and, further, "This Court has never set up formulas of fact as rules of law."

Although the determination of the Commissioner is presumed to be correct, we believe that there is no evidence in this case to support a finding that the plaintiff held her 1% interest in this realty primarily for sale in the course of her business and, further, that the evidence negatives any such inference.

Judgment is, therefore, awarded to plaintiffs with directions that they prepare findings of fact and conclusions of law, in accordance with this Opinion, as provided by Rule 21 of this Court.

Dated: October 19th, 1960.

/s W. T. SWEIGERT,

United States District Judge.

[Endorsed]: Filed Oct. 19, 1960.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on regularly for trial on August 23 and 24, 1960, before the Court without a jury, the Honorable William T. Sweigert, Judge, presiding. The plaintiff, Lois W. Rosebrook, appeared in person and by her attorneys, Eugene J. Brenner and Harry L. Freeman of Janin & Morgan, and the plaintiff, Charles Rosebrook, appeared only by said attorneys. The defendant appeared by its attorneys, Laurence E. Dayton, United States Attorney for the Northern District of California, and Richard L. Carico and Thomas E. Smail, Jr., Assistant United States Attorneys for said District. Oral and documentary evidence was introduced by and on behalf of the respective parties, arguments were made by their attorneys, and the cause submitted at the conclusion of trial.

The Court, being fully advised in the premises, made and entered its Memorandum and Opinion on October 19, 1960, granting judgment for the plaintiffs and directing preparation of the following:

Findings of Fact

1. This is a suit for refund of 1955 federal income taxes of \$303.72 and interest of \$59.37 assessed against the plaintiffs and paid by them to the District Director of Internal Revenue at San Francisco, California, on September 28, 1959. A claim for refund of the assessed taxes and interest, together with interest as provided by law, was filed by the plaintiffs on September 28, 1959. A claim for refund of the assessed taxes

and interest, together with interest as provided by law, was filed by the plaintiffs on September 29, 1959, and was denied in full by the Commissioner of Internal Revenue by registered letter dated December 17, 1959. This suit was commenced on December 18, 1959.

2. The plaintiff, Lois W. Rosebrook, is the adult daughter of George W. Williams and Hortense Williams. She married the plaintiff, Charles E. Rosebrook, on February 12, 1955, and filed a joint federal income tax return with him for the calendar year 1955. (Hereinafter the word "plaintiff" refers only to Lois W. Rosebrook.)

3. In 1942 when plaintiff was a minor, her parents, George W. and Hortense Williams, as grantors, established an irrevocable trust with George W. Williams as sole trustee and conveyed into the trust cash and other assets. The trust instrument gave the trustee broad powers relating to trust investments, but he did not exercise them except to the extent herein found.

4. Plaintiff was graduated from Stanford University in 1946 with a Bachelor of Arts degree, major in English. From 1946 to 1953 she was a housewife, sometimes working as a medical receptionist. From 1953 to 1955 she worked in an auto rental firm, a rug cleaning firm, and briefly for her father as a secretary. Since February 12, 1955, she has been a housewife and has not been otherwise employed.

5. The plaintiff has never held a real estate broker's or salesman's license, has never entered into any written or oral partnership agreement or signed a partnership tax return in connection with venture hereinafter considered, and has no background or pattern of activity in the real estate business.

6. Some time prior to 1953, George W. Williams had acquired an option on 1159.6 acres of land on the San Francisco Peninsula near San Bruno, California, which was owned by the San Bruno Lands, Incorporated, and was attempting to purchase said land.

7. George W. Williams was having difficulty obtaining sufficient financing to make the purchase until May, 1953, when he interested a group of people, including himself, Frank Burrows, Andrew J. Conway, Martin Wunderlich, and Thomas J. Culligan in joining with him. It was understood that the above respective parties were acting not only for themselves, but for other interest represented by them.

8. On April 23, 1953, the above parties entered into an agreement whereby they agreed to purchase the stock of San Bruno Lands, Incorporated for a total of \$1,150,000.00 for the purpose of acquiring the 1159.6 acres of land, and that after the acquisition they would dissolve the corporation and take the land as tenants in common in proportion to their respective contributions.

9. On May 7, 1953, the above five parties plus others, including George W. Williams, as trustee for the trust of Lois W. Rosebrook, entered into an agreement with Williams, Conway and Wunderlich reciting that said three men would acquire said 1159.6 acres for the benefit of all the individuals and would immediately convey the property to them in stated percentage interests, the interest of the trust for plaintiff to be 1%.

10. On May 7, 1953, George W. Williams, Andrew J. Conway and Martin Wunderlich, purchased the capital stock of San Bruno Lands, Incorporated. These three individuals acted pursuant to an agreement between themselves and the shareholders of San Bruno

Lands, Incorporated. The shareholders of San Bruno Lands, Incorporated were reluctant to deal with more than three people, but it was understood that Andrew J. Conway, Martin Wunderlich and George W. Williams were acting not only for themselves, but for other members of the group.

11. The corporation was liquidated immediately thereafter and the land was taken in the name of Williams, Conway and Wunderlich, who on June 8, 1953, quitclaimed it to the tenants in common according to their respective contributions to the purchase price. Williams, Conway and Wunderlich took back a power of attorney from all members of the group, dated June 8, 1953, for purposes of facilitating such things as the execution of leases.

12. Among the contributing parties represented in these transactions by George W. Williams was the irrevocable trust created in 1942 for the benefit of plaintiff. In May, 1953, there was cash on hand in the trust assets in excess of \$10,000.00. Williams, acting as trustee, paid \$7,000.00 cash on behalf of the trust as its part of the contribution of his group to the acquisition of the San Bruno land. In due course, the trust received a conveyance of a 1% interest therein as tenant in common.

13. On October 28, 1953, Williams, Burrows, Conway, Culligan, and Wunderlich, and an outside party, Boettcher & Company organized Consolidated Lands, Incorporated for the purpose, among others, of subdividing and developing the San Bruno land. Boettcher & Company held a 22% interest therein.

14. On December 18, 1953, when plaintiff was twenty-eight years of age, the irrevocable trust for her

benefit was dissolved and all the trust assets, including the 1% interest in San Bruno Lands, were transferred by George W. Williams as Trustee to the plaintiff, Lois W. Rosebrook, in her own name. She executed a document entitled "Receipt and Release" accepting the conveyance to her of said property.

15. The trust for the benefit of plaintiff had never sold a parcel or interest in real property although it held, and plaintiff continues to hold, interests in two other parcels of real estate as investments.

16. Said trust property was conveyed to plaintiff without any oral or written conditions attached thereto. No power of attorney relating to said property with plaintiff as grantor and George W. Williams as grantee, was given or has ever existed in regard to this property.

17. Both before and after the trust for the plaintiff was terminated, rents from the property were collected and paid into a common bank account and expenses relating to the property, except property taxes and interest, were paid from said account. Periodic accountings were prepared for the tenants in common by an employee of the G. W. Williams Company, a corporation in which plaintiff's father was interested. Plaintiff acquiesced in this arrangement. Property taxes and interest were paid individually by each tenant in common, including plaintiff, in proportion to his or her interest in the property.

18. On February 10, 1954, the tenants in common of the 1159.6 acres sold and conveyed 884.2 acres of the parcel to Consolidated Lands, Incorporated for a total purchase price of \$1,768,500.00 payable \$100,000.00 in cash and an installment note of the corporation for the balance.



19. Plaintiff, acting substantially on the business advice of her father, conveyed her 1% interest to the corporation and received the sum of \$1,000.00 cash at that time, and a 1% interest in the installment note for the balance.

20. Plaintiff's sale of her 1% interest in the 884.2 acre parcel of San Bruno Lands was the first sale of real estate ever made by her and, with the exception of a subsequent sale in August, 1956, of her 1% interest in an additional 80 acres of the land to Consolidated Lands, Incorporated for a shopping center, it has been her only sale of real estate.

21. Neither plaintiff, nor the trust for her benefit, ever became a stockholder, officer, director, or employee of Consolidated Lands, Incorporated. Plaintiff knew of no commitments for the sale of the property to Consolidated Lands, Incorporated and had no further concern with the development of the land for business purposes after the sale of her interest to Consolidated Lands, Incorporated.

22. Whatever business purpose he might have had acting in his individual capacity, George W. Williams, as trustee, did not commit the trust for the benefit of the plaintiff, or the plaintiff, to a purpose of holding property for sale to customers in the ordinary course of a trade or business.

23. The plaintiff reported her share of the profit from this sale on the installment basis, and for the year 1955 reported \$2,056.91 as a long-term capital gain. This long-term capital gain treatment was subsequently challenged by the Commissioner of Internal Revenue upon audit of her return, and additional tax and interest was assessed as set forth in Finding No. 1.

Immediately after payment, the plaintiffs filed a claim for refund, alleging that Lois W. Rosebrook's interest in the property sold to Consolidated Land Company, Inc. was a capital asset; and said claim was thereafter denied in full, as aforesaid.

Conclusions of Law

1. This Court has jurisdiction of this action and the parties to it.

2. No true business partnership existed among the plaintiff and the other holders of undivided interests to the land in question.

3. Plaintiff was not a dealer in real property.

4. Plaintiff did not hold her interest in the 884.2 acres of land in San Bruno, California, primarily for sale to customers in the ordinary course of a trade or business.

5. The interest in land sold by the plaintiff was a capital asset in her hands as defined by §1221 of the Internal Revenue Code, 26 U.S.C. 1221.

6. Plaintiff properly reported gain on the subject sale of an interest in land as capital gain.

Judgment will be entered for plaintiff in the amount prayed for.

Dated: Jan. 3, 1961.

/s/ W. T. SWEIGERT,

Judge of the United States District  
Court for the Northern District of  
California, Southern Division.

Approved as to Form:

/s/ RICHARD L. CARICO,

Assistant United States Attorney.

[Endorsed]: Filed Jan. 3, 1961.

In the United States District Court  
for the Northern District of California  
Southern Division

Civil Action

No. 38765

CHARLES E. ROSEBROOK and LOIS W. ROSE-  
BROOK,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT FOR PLAINTIFFS ON  
FINDINGS OF COURT

The issues in the above-entitled action having been duly and regularly brought on for trial before the Court sitting without a jury, the parties having appeared by their respective counsel, the evidence adduced by the parties having been heard, and the issues having been duly tried, the Court filed its Memorandum and Opinion on the 19th day of October, 1960, and its Findings of Fact and Conclusions of Law on the 3rd day of January, 1961, directing judgment as hereinafter provided, it is now

Ordered, Adjudged and Decreed that the plaintiffs, Charles E. Rosebrook and Lois W. Rosebrook, recover of the defendant, United States of America, the sum of \$363.09 (with interest thereon at the rate of 6%



per annum from the 28th day of September, 1959)  
plus their costs in this action.

/s/ W. T. SWEIGERT,  
United States District Judge.

Approved as to Form:

/s/ RICHARD L. CARICO  
Asst. United States Attorney.

[Endorsed]: Filed Jan. 3, 1961.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice is hereby given that the United States of America, the defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 3, 1961.

Dated: March 2, 1961.

LAURENCE E. DAYTON  
United States Attorney.

/s/ RICHARD L. CARICO,  
Asst. United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 2, 1961.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

The appellant, United States of America, designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action: the complete record and all the proceedings and evidence.

Dated: March 2, 1961.

LAURENCE E. DAYTON,  
United States Attorney.

/s/ RICHARD L. CARICO,  
Asst. United States Attorney.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 2, 1961.

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[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter having been presented to the Court on the ex parte application of the defendant, United States of America, in accordance with Rule 73(g) of the Federal Rules of Civil Procedure, and good cause having been shown therefor:

It is ordered that the time within which the defendant, United States of America, must file the record on

appeal and the time for docketing the appeal is extended from April 11, 1961 to May 31, 1961.

Dated: April 7, 1961.

/s/ W. T. SWEIGERT,

United States District Judge.

[Endorsed]: Filed April 7, 1961.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON  
APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits listed below, are the originals filed in this court in the above entitled case and constitute the record on appeal herein as designated by counsel for the Appellant:

Complaint.

Summons, executed.

Answer.

Notice & Motion for trial date (without jury).

Notice of motion for continuance.

Subp. executed as to Gerhard Mohr.

6 subp. executed as to T. J. Culligan, Jr., Frank Ferguson Burrows, Andrew Conway, Joseph W. Mell, Jr., Norman Sullivan, and Martin Wunderlich.

Defendant's trial memorandum.

Plaintiff's trial brief.

Partial stipulation of facts.

Memo of Plaintiff on nonadmissibility of exhibit.

Subp. executed as to George Williams.

Reporter's Transcript, proceedings of trial.

Memorandum and opinion.

Defendant's objections and proposed modifications,  
findings & conclusions.

Findings of fact and conclusions of law.

Judgment for Plaintiff on findings of Court.

Notice of entry of Judgment.

Memo cost bill, taxes at \$63.00.

Notice & Motion to review taxation of costs, by De-  
fendant.

Order disallowing certain items taxed by the Clerk.

Notice of appeal.

Designation of contents of record on appeal.

Order extending time to file record and docketing the  
appeal.

Plaintiff's exhibits No. and No. 2.

Defendant's exhibits A to G inclusive.

In Witness Whereof, I have hereunto set my hand  
and affixed the seal of said District Court of this 26th  
day of May, 1961.

[Seal]

JAMES P. WELSH,  
Clerk.

/s/ By HARRY R. OLIVER,  
Deputy.

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In the United States District Court  
Northern District of California  
Southern Division

Before: Honorable William T. Sweigert, Judge.

No. 38,765

CHARLES ROSEBROOK and LOIS W. ROSE-  
BROOK,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

Appearances: For the Plaintiff: Eugene J. Bren-  
ner, Esq., Harry L. Freeman, Esq. For the Defend-  
ant: Laurence E. Dayton, Esq., United States Attor-  
ney, By: Richard Carico, Esq., Asst. United States  
Attorney, Thomas Smail, Esq., Asst. United States At-  
torney.

PROCEEDINGS OF TRIAL

August 24, 25, 1960 [1]\*

\* \* \* \* \*

LOIS W. ROSEBROOK,

a plaintiff herein, called as a witness in her own be-  
half, being first duly sworn, testified as follows:

The Clerk: Please state your name and occupation  
for the Court.

The Witness: Lois W. Rosebrook, housewife.

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\*Page numbers appearing at top of page of Original  
Transcript of Record.

(Testimony of Lois W. Rosebrook.)

Direct Examination

By Mr. Brenner :

Q. What is your address, Mrs. Rosebrook?

A. 1228 Kenilworth Road, Hillsborough.

Q. What was your address in 1955?

A. 515 North El Camino, San Mateo.

Q. What was your occupation in 1955?

A. Well, I was married in February 1955. Before then I had been a secretary.

Q. Would you trace briefly for us your formal educational [37] background?

A. I graduated from Burlingame High School in 1942 and Stanford University in 1946.

Q. What was your major at Stanford University?

A. English major.

Q. Did you take any real estate classes at Stanford?      A. No.

Q. Have you ever taken any real estate classes anywhere?      A. No, I have not.

Q. Would you trace for us briefly your occupational or working background, naming the employers and so forth?      A. Well, to go back—

The Court: Just briefly; just to give us some idea of your business background.

The Witness: I was a medical receptionist, and I worked for Hertz Rent a Car, and Girl Friday for G & G Rug Company, private secretary.

Mr. Brenner: Q. Are you married?

A. Yes, I am.

Q. What is your husband's name?

A. Charles Ernest Rosebrook.

(Testimony of Lois W. Rosebrook.)

Q. What was his occupation in 1955?

A. He was a floor manager for KGO-TV.

Q. Did Mr. Rosebrook have an interest in the real property which forms the subject of this suit? [38]

A. He knew nothing about it at that time.

Q. Mrs. Rosebrook, did you file a joint tax return with Mr. Rosebrook for the year 1955?

A. Yes.

Mr. Brenner: May I have Exhibit 1-A, please?

Q. Mrs. Rosebrook, I show you Exhibit 1-A to the stipulation of facts which we have submitted here today. This is a photostatic copy. I will ask you if this is your signature on page 1 of the tax return, which is Form 1040.

A. Yes, it is.

Q. What were your duties when you were a secretary, Mrs. Rosebrook?

A. Answering the telephone, making appointments with and for my employer, and taking his dictation and doing typing, and so on.

Q. Who was your employer?

A. My father, Mr. Williams.

Q. Was it your father or a business owned by him?

A. Well, technically I guess you would say a business owned by him, but he was my immediate superior.

Q. What is the name of the employer, the business?

A. The G. W. Williams Company.

Q. Is that a corporation?

A. Yes, it is.

Q. How long did you work in that capacity? [39]

A. I would say about three or four months.

Q. Did your duties as an employee of the G. W.



(Testimony of Lois W. Rosebrook.)

Williams Company ever require you to familiarize yourself with the economics of buying and selling real estate?      A. No, they did not.

Q. Were you ever consulted on problems concerning the buying and selling of real estate?

A. No.

Q. Had you been to business school before you became a secretary?      A. No, I had not.

Q. In 1953 and 1954 or 1955 were you an officer or director of any corporation?

A. No, I was not.

Q. Specifically, you were not an officer in the San Bruno Lands or Consolidated Lands?

A. No, I was not.

Q. Have you ever been an officer or director of San Bruno Lands or Consolidated Lands?

A. Of neither one.

Q. In 1953 or 1954 or 1955 did you acquire or own any interest in real property?

A. When the trust was dissolved in December 1953, I acquired some.

Q. What interest in real property did you acquire at that time? [40]

A. It was the one percent interest we are talking about here in the San Bruno Land, and two buildings, the Ford and Buick Buildings in San Bruno.

Q. I didn't hear that last remark.

A. The Ford and Buick Buildings in San Bruno.

Q. You had an interest in those buildings?

A. That's right.

Q. Do you know what interest you had?

A. I think it is around a third.



(Testimony of Lois W. Rosebrook.)

Q. Do you know how your interest is held in those two buildings?           A. In my own name.

Q. Do you still have those two buildings?

A. Yes, I have.

Q. That is, your interest in those two buildings.

A. That's right.

Q. Who established the trust for your benefit?

A. My mother and father did.

Q. Do you know when?           A. 1942.

Q. How old were you at that time?

A. I think I figured out I was around 18.

Q. Who was the trustee of the trust?

A. My father was.

Q. And what is his name?

A. George W. Williams. [41]

Q. Did you know what the trust property was at that time?           A. No, I did not.

Q. Do you know when the trust was dissolved?

A. Yes, December 18, 1953.

Q. Mrs. Rosebrook, where were you in May and June of 1953?

A. 1953? Somewhere around Jerusalem or Cairo or Istanbul.

Q. You were traveling?

A. That's right.

Q. Do you remember the facts and circumstances surrounding the dissolution of the trust?

A. Well, mainly that it was dissolved and I was handed certain papers listing the assets of the trust.

Q. Was there an attempt made to familiarize you at that time with the trust property?

A. Oh, yes.

(Testimony of Lois W. Rosebrook.)

Q. I show you a document entitled Quitclaim Deed dated December 18, 1953, which is Exhibit C-3 to the stipulation which was filed here today, and ask you if you have ever seen that. A. Yes, I have.

Q. Do you remember the circumstances, briefly, in your own words?

A. As I recall, I think my father got us all together to dissolve the trust. It was probably in the study of my folks' home, and we were handed out the papers and I signed the [42] Assumption of Liability and signed the receipt.

Q. I show you now three sheets of paper entitled 4-D, or marked 4-D, which are exhibits to the stipulation which was submitted here today, and ask you if you recognize that.

A. Yes, bonds and stock shares, yes.

Q. Briefly, were these the documents by which certain properties were transferred to you out of the trust?

A. That's right, plus the straight bonds themselves.

Q. You received the bonds themselves?

A. Yes. I got to clip the coupons.

Q. Mrs. Rosebrook, I show you now a document entitled Receipt and Assumption of Liability and it's marked 5-E to the stipulation here today, and I will ask you if you recognize that document. A. Yes.

Q. Would you describe what it is?

A. Well, it assigned various shares in companies. They were stock shares. And the deeds, and that I had received these things, that I signed them, and some notes.

Q. Did you sign the original of this document?

A. Yes.

(Testimony of Lois W. Rosebrook.)

Q. Now, Mrs. Rosebrook, was there an attempt made to familiarize yourself with the whole property picture of the trust at the time of its dissolution?

A. I tried to become more familiar with it as time went on, yes. [43]

Q. What did your father tell you at the time of distributing the property out of the trust to you?

A. He said now that he distributed it, it was time that we learned how to handle our own property.

Q. And how did you keep familiar with the property which you now held in your own right?

A. Well, as far as the Ford and Buick Buildings went, we received accountings.

Q. And how about so far as this one percent interest was concerned?

A. Oh, yes, there were accountings there and our portions of taxes that had to be paid and debts that came in.

Mr. Brenner: At this time, Your Honor, I would like to have marked for identification Plaintiff's Exhibit 2.

(Document entitled Accounting was marked Plaintiff's Exhibit 2 for identification.)

Mr. Carico: Your Honor, we would like to have a copy of this document.

The Court: What is it?

Mr. Carico: We would like to have a copy of that document.

The Court: A copy?

Mr. Carico: A copy, yes.

The Court: If counsel has a copy, he will give you

(Testimony of Lois W. Rosebrook.)

a copy. Otherwise, you will have an opportunity to examine it. [44]

Mr. Brenner: Q. Mrs. Rosebrook, I show you a document marked Plaintiff's Exhibit 2 for identification and entitled "Accounting," and ask you if you would identify that document and tell us a little about it.

The Court: You can lead her, if you know what it is. Let's move along.

Mr. Brenner: Q. Mrs. Rosebrook, you said that you were kept familiar with the affairs of the land in which you held a one percent interest?

A. That's true.

Q. Is this a copy of the document by which you were kept informed?

A. Yes, it tells where the money goes and how much was owed the bank.

Mr. Brenner: At this time, Your Honor, I would like to submit this into evidence.

The Court: Any objection? Let's have the record clear. Did you offer something in evidence?

Mr. Brenner: Yes, Plaintiff's Exhibit 2.

The Clerk: I have it right here, Your Honor.

The Court: Any objection?

Mr. Carico: No objection.

(Whereupon Plaintiff's Exhibit 2 for identification was received in evidence.)

Mr. Brenner: Q. Mrs. Rosebrook, did you receive any [45] income from this property over a period of time? A. Yes, I did.

(Testimony of Lois W. Rosebrook.)

Q. What was the nature of that income, do you know?

A. It was some money from the land that the Navy was renting and flower leases.

Q. Did you ever pay any expenses in regard to the property?

A. Yes, there were various expenses that came up.

Q. Can you give us an example of some of the expenses you were called on to pay?

A. I think—well, one that comes to mind is probably the fact we would have to burn the weeds off so it would not be a fire hazard to the rest of the area.

Q. Do you know how taxes were handled in regard to this property?

A. As I recall, we would receive a notice of our share, or each one would receive a notice of his share of taxes. Mr. Crane sent them out, I believe, and we would send in our individual checks for the amount we owed.

Q. What would you do then?

A. Send the checks to Mr. Crane for the amount that we owed.

Q. For your proportionate share of the taxes?

A. That's right.

Q. Do you know what Mr. Crane would do with the checks?

A. I certainly hope he gave them to the tax people.  
[46]

Mr. Carico: Objection. No showing that she knows what Mr. Crane did with the checks or even who Mr. Crane is.

The Court: Overruled.

(Testimony of Lois W. Rosebrook.)

Mr. Brenner: Q. When you received your interest in the property, were any oral conditions stated to you upon receipt of the property, any oral conditions upon giving the deed to you?

A. No, there were not.

Q. Did you sign any written conditions or acceptance to any written conditions in relation to the distribution of the property to you? A. No.

Q. Was there any understanding between you and anyone else as to how you would hold this property or what any use or disposition of it would be?

A. No.

Q. Mrs. Rosebrook, have you ever been asked to sign a partnership tax return?

A. No.

Q. In your opinion, are you a member of any partnerships?

Mr. Carico: Objection, Your Honor.

The Court: Sustained.

Mr. Brenner: Q. Can you describe your interest in these 1,159 acres of land further?

A. Well, as it was explained to me when the trust was [47] dissolved, I owned my share. It was an undivided share and I was a tenant in common, and I owned mine in my own right, and if there was any discussion on it, I could say, no, I didn't like to do this. In other words, I could voice my opinion and it would be heard.

Q. Did you sign any partnership agreement in relation to the property?

A. I have never signed any partnership agreement.



(Testimony of Lois W. Rosebrook.)

Q. Did you enter into any agreement or understanding that the majority would control in regard to any use and disposition of this property?

A. No.

Q. Have you ever objected to any use or disposition of this property?

A. At one time a memo came around saying there were a certain amount of top soils to be sold, and my husband and I had just been buying it and we had paid a great price for this and it seemed that this top soil was going at a very low price, and I wrote a note suggesting they certainly try to do better on the price, and, as it turned out, we did.

Q. Would you elaborate on that, "as it turned out, you did"? What happened? How did you voice your objection?

A. I wrote it down, and as it turned out, the original sale did not go through and I think a higher price was finally acquired. [48]

Q. Mrs. Rosebrook, do you know how much of the land was conveyed to Consolidated Lands on February 10, 1954?

A. Around 884 acres.

Q. Was this the first sale of an interest in land you had ever made?

A. Except for the property settlement in the divorce case, yes.

Q. Do you know how the gain on the sale of your interest was recorded?

A. Long term capital gains. It was an installment sale.



(Testimony of Lois W. Rosebrook.)

Q. Did you go through some sort of mental process in considering whether or not you should sell your interest in the land?

Mr. Carico: Objection, Your Honor.

The Court: That question doesn't mean anything. "Mental process"? I wouldn't know what she meant if she did say "yes."

Mr. Brenner: Q. How did, Mrs. Rosebrook, the opportunity to sell the interest in the land come to your attention?

A. My father told me about it and mentioned that the price was an excellent one; in other words, we were practically doubling the initial investment that had been made. And at that time I could certainly use the money.

Q. Would you expand upon that, that you could certainly use the money? [49]

A. Well, at that time, in February of 1954, I was living in an apartment by myself with my small daughter and about getting ready to go to look for work, and there was no alimony so money was very handy.

The Court: How much, so far as you were concerned, would it mean in income to you?

The Witness: It would mean right at that point about a thousand dollars.

The Court: And further payments—

The Witness: To come in.

The Court: And did you ever see the agreements which your father had entered into either with the San Bruno Land Company or with the —well, with any of the associates in this matter, the other owners in common?

(Testimony of Lois W. Rosebrook.)

The Witness: The only thing was when I finally signed the paper to sell my one percent interest in the land.

The Court: Up to that time had you seen any agreements between your father and Mr. Conway and these other people who had an interest in the property?

The Witness: No.

The Court: Had your father or anyone else ever explained those agreements to you, told you what they contemplated or provided?

The Witness: No. The property was given to me and I knew of nothing in the near future that was going to be done. [50]

The Court: Up to that time, had you known anything about the property or what your father had done when he acquired it?

The Witness: I knew none of the details.

The Court: It was only at the time you made the sale that your father explained to you it was an advantageous sale?

The Witness: Well, he had explained beforehand that perhaps a chance would come up, and that the price was very good, and at that point I agreed it was a good idea.

The Court: Now, the lady says, as I understand it, at the time that she sold the property she hadn't seen any agreement of her father's entered into with any of the other owners of the property and he hadn't explained those agreements to her.

As I understand, the only discussions with your father giving any information regarding your interest

(Testimony of Lois W. Rosebrook.)

in this property was what, prior to the time you actually sold it?

The Witness: Was when the trust was dissolved and it was explained I was holding this one percent in my own right, and I was a tenant in common, and that—I guess you call it that I had a veto power, and I could object to anything that was going on.

The Court: All right, was anything said about any commitments your father had made to sell the property to any particular person or any particular company?  
[51]

The Witness: No, sir.

The Court: All right, go ahead.

Mr. Brenner: Q. Did you personally consider this an advantageous sale?

A. When you can double your money, it is usually a pretty good sale.

Q. But this was a personal judgment on your part?

A. Definitely.

Q. Mrs. Rosebrook, was there any particular means adopted to inform you of your property holdings upon dissolution of the trust?

A. You mean aside from the accountings that came through?

Q. No, at the time of the dissolution of the trust, was there any particular means adopted to attempt to start to familiarize you with the property holdings which you now had?

A. Oh. Well, my father—

The Court: She told me she had no conversation with her father or anybody else about this property up

(Testimony of Lois W. Rosebrook.)

to the time it had been put into her hands and she was about to sell it. Is that right?

The Witness: That's true up to a point. When my father dissolved the trust and we got all these things, and then I had suggested it would be nice to have—well, it would be nice to know more about it, but up until a short time before the actual sale was arranged, that was when it was first talked [52] of, but not all along. For three or four months before the sale was made.

The Court: But did your father ever tell you that the property was committed by certain agreements that he had made to be sold to or intended to be sold to the Consolidated Land Company?

The Witness: I knew of no commitments that he had and I didn't know anything about the Consolidated Lands.

The Court: All right.

Mr. Brenner: Q. Upon or immediately after dissolution of it, did you attend any meetings to familiarize yourself with the property?

A. Yes, we had meetings in my father's study at home.

Q. Would you describe them more in detail?

A. Well, we would ask him questions about the various properties and he would try to answer our questions.

Q. At whose suggestion were these meetings held?

A. I expect it was mine. I asked about it at the time the trust was dissolved.

Q. Have you ever made any other sales or conveyances of land or interests in land?

(Testimony of Lois W. Rosebrook.)

A. Well, the Navy condemned the 53 acres, so I guess that is a conveyance. And there was the sale to Consolidated of 80 acres for the shopping center.

Q. Do you know when the Navy condemnation was? [53]

A. I think it was November of 1956.

Q. Do you know when the sale of the 80 acres took place?

A. That was sometime in August or September.

Q. Of what year?

A. 1956.

Q. Did you join in that sale? A. Yes.

Q. How did you report that sale for tax purposes?

Mr. Carico: Objection. That is completely outside the scope of the issues in this case.

The Court: I don't see that is is very helpful.

Mr. Brenner: Your Honor, if I may explain the purpose of the question—

The Court: Go into it, if you want to, if it will save time. Go ahead.

Mr. Brenner: One of the tests in this type of case is frequency of transactions, and what I wish to establish is that she only made two sales and that on one of them she reported it as capital gains treatment, which has never been challenged, although her returns were audited.

The Court: All right, go ahead.

Mr. Brenner: Q. Do you know how you reported that sale for tax purposes?

A. Long term capital gains.

The Court: What parcel are you talking about? [54]

(Testimony of Lois W. Rosebrook.)

Mr. Brenner: This is the 80-acre parcel, Your Honor, sold in August of 1956, or thereabouts.

Q. Was your return for 1956 audited, Mrs. Rosebrook?

A. Yes, I believe it was.

Q. Do you know if the reporting as capital gains of this 80 acres has been challenged?

A. No, it has not.

Mr. Carico: Objection. This is going into something that took place long past—(inaudible to the reporter).

The Court: Go ahead.

Mr. Brenner: Q. You may answer.

The Court: The question was, Was it ever challenged, that is, the reporting of it as a capital gain?

The Witness: No.

The Court: So far as you know?

The Witness: Not so far as I know.

Mr. Brenner: Q. Mrs. Rosebrook, were you in a position to know what would happen if anyone objected to an intended use or disposition of that parcel of this property?

Mr. Carico: Your Honor, this seems to call for—

The Court: Reframe it. Be as specific as you want.

Mr. Brenner: Q. Based upon what you had observed, do you know what would happen if any single person objected to a purported use or disposition of this property?

Mr. Carico: Objection, Your Honor. [55]

The Court: I don't understand the question. Ask



(Testimony of Lois W. Rosebrook.)

her what you want to know and go right ahead. Come to the point.

Mr. Brenner: The purpose of the question, Your Honor, is to show that any one person could have prevented any use of the property which is an attribute of tenancy in common but not of a joint venture or partnership.

The Court: Well, establish what the facts were and we will determine that. Any conversations—

Mr. Brenner: Q. Mrs. Rosebrook, of your knowledge did anyone at any time object to any proposed use or disposition of the property?

A. Well, I know that I myself did once object on the top soil.

The Court: She has already gone into that.

Mr. Brenner: Q. Have you made acquisitions of interests in property or parcels of property other than the two which we have mentioned here today?

A. Yes.

Q. Briefly, would you describe them?

A. One is our home on Kenilworth Road in Hillsborough, and the other is an oak-studded lot on Black Mountain which would make a beautiful place for a home, and then there is stock,

Q. Have you sold any of those interests in property? [56]

A. Not in the property, no.

Q. Do you make other investments besides in real property?

A. I have been trying to buy a duplex or triplex as investment property, but so far found nothing that has worked out.



(Testimony of Lois W. Rosebrook.)

Q. How about property other than real property?

A. Such as stocks?

Q. Yes.

A. Yes, I made stock purchases.

Q. Can you name some of the stock purchases you have made?

A. We bought Barium, and sold it too soon, I'm afraid, and we have stock in Watson Bros. Trucking Company and Tennessee Gas & Transmission.

Q. When you sold your interest in the 884 acres, how much did you sell it for?

The Court: You mean so far as she is concerned personally?

Mr. Brenner: Yes.

The Court: That would be the 1954 sale?

Mr. Brenner: Yes, Your Honor.

The Court: Do you know how much it meant, total interest of yours payable over a period of years? You told me a thousand dollars down.

The Witness: A thousand dollars in the beginning.

The Court: Do you know what the rest of it was to be in total? [57]

The Witness: I couldn't tell you the exact figure.

Mr. Brenner: Q. Are you still receiving payments from that sale, Mrs. Rosebrook?

A. Yes, small checks are coming in.

Q. In 1954 and 1955, Mrs. Rosebrook, were you living at home? Pardon me, were you living at your parents' home?

A. For about, oh, maybe eight months I had lived at home in 1954.

Q. Until approximately—

(Testimony of Lois W. Rosebrook.)

A. That was 'til somewhere around December. No, I'm sorry. I am trying to get the dates. In 1954 I had moved into the apartment—that was before Christmas of 1953, so I was in the apartment in '54 and '55.

Q. Did your father give you any instructions in early February of 1954 in regard to the sale of your interest in the property?

A. He didn't give me instructions; he told me about the sale that was coming up.

Q. And what did he tell you you should do in regard thereto?

A. He said I could make up my own mind, but that it was a very good investment and a good opportunity.

Q. Mrs. Rosebrook, what is your opinion of your father's investment ability?

A. I think he has done very well with it.

Q. Are you a shareholder in Consolidated Lands?

A. No, I am not. [58]

Q. Have you ever been? A. No.

Q. Are you an officer or director of Consolidated Lands? A. No.

Mr. Carico: Your Honor, I believe this has all been asked and answered.

Mr. Brenner: I am sorry if there is duplication, Your Honor.

Q. Mrs. Rosebrook, do you keep track of your own investments?

A. I certainly try to.

Q. Would you expand upon that a bit?

(Testimony of Lois W. Rosebrook.)

The Court: Is it necessary, counsel? She says she takes care of it. Unless it is questioned on cross-examination, we will assume that.

Mr. Brenner: I have no further questions on direct, Your Honor.

The Court: All right.

Mr. Carico: Does Your Honor wish to continue at this time? It is nearly noon.

The Court: For about five minutes, yes.

Cross-Examination

By Mr. Carico:

Q. Mrs. Rosebrook, I believe you stated that for a period of about three or four months you worked for G. W. Williams Company? [59]

A. That's correct.

Q. As a secretary? A. That's right.

Q. And your father is owner and an officer in that company? A. He is president of it, yes.

Q. During what period of time was that?

A. Well, to go backwards, I believe I stopped working there at the end of January, 1954, so I must have gone to work there sometime in the last part of—No, I'm sorry, I get my years mixed up. I stopped working there the last of January, 1955, because I was getting married in February of 1955, so then it would go back about three or four months.

Q. Now, with reference to the distribution of the property out of the trust, at the time this was distributed to you, you stated your father explained generally what the nature of the property was?

A. That's right.

(Testimony of Lois W. Rosebrook.)

Q. Had you ever held any substantial amounts of investments or income property prior to this time?

A. No.

Mr. Brenner: Immaterial, Your Honor. Completely irrelevant to this case.

The Court: Overruled. Go ahead.

Mr. Carico: Q. Would it be fair to say, then, that you were, so to speak, a babe in the woods as far as investments [60] were concerned?

A. I had never invested in anything except the house and lot I owned at that time.

Q. Can you fix the time a little more accurately—

The Court: When did you say—You say you got this property in February 1954?

The Witness: I got this property when it was dissolved in '53.

Mr. Carico: December 1953.

The Court: Oh, yes. Up to that time, then, the question was, had you ever bought any property?

The Witness: Only the original house and lot dissolved in the property settlement when I had the divorce.

The Court: Were you married before 1953?

The Witness: Yes, sir.

The Court: Oh, I see. And you, with your husband, had bought a house?

The Witness: That's right, a house and lot.

The Court: The same house and lot. All right, go ahead.

Mr. Carico: Q. Now, you mentioned that—I believe you stated early in 1954 your father brought this

(Testimony of Lois W. Rosebrook.)

proposition to you regarding the sale of this one per cent interest in a certain portion of the old San Bruno Lands, is that correct?      A. Yes. [61]

Q. Can you fix the date with some degree of preciseness? Was this early in January, late in January—

A. I think it was somewhere around the first part of February. [61-A]

Q. Around the first part of February? And what did he tell you in detail regarding this sale so far as the terms, the proposal that was being made?

A. Oh, I can't recall the complete and full details. I think the thing that sticks in my mind now is that the price was right, so to speak.

Q. Did he recommend this investment or sale to you?

A. Yes, and I agreed with him. It sounded like a very good idea.

Q. At that time did you know that your father was one of the owners and officers of Consolidated Lands?

A. I think by that time I realized that there were several of the same people involved, yes.

Q. Can you tell us approximately when this first came to your attention?

A. The actual sale? Is that what you are talking about?

Q. No, that Consolidated Lands Company was controlled by the same group that owned part of the land being sold.

A. Well, when I was down at my father's office, which is where I think I probably saw for the first time Mr. Wunderlich and Mr. Conway and Mr. Culli-

(Testimony of Lois W. Rosebrook.)

gan, I was right there outside the door when the Consolidated Lands meetings were being held, so I knew they were in there.

Q. You said at that time. Approximately when would that be? Approximately late January or what do you think? [62]

The Court: In respect to the time you made the sale to Consolidated lands, that is, the February 1954 sale, how long before that sale did you realize that your father and others were interested in Consolidated? A period of a year, a month, six months?

The Witness: I think it was just a very short time, and that is the best I can place it.

The Court: How long? A month, three months?

The Witness: I would say the last part of January or the early part of February.

Mr. Carico: Q. In other words, within some eight or ten days prior to the sale which took place on, I believe, February 10, 1954?

A. As I recall, yes.

The Court: Well, do you have some more?

Mr. Carico: Quite a bit more, Your Honor.

The Court: Well, we will have to take a recess until 2:00 o'clock today.

(A recess was taken until 2:00 p.m. this date.)  
[63]

Afternoon Session, Tuesday,  
August 23, 1960—2:00 P.M.

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LOIS W. ROSEBROOK,  
resumed the stand and testified further as follows:



(Testimony of Lois W. Rosebrook.)

Cross-Examination (Continued)

By Mr. Carico:

Q. Mrs. Rosebrook, in your direct testimony you made some reference to an objection to the sale of some topsoil at one time by this group. About when was that contemplated sale—when did it take place, or when was it to take place?

A. I cannot remember the exact time.

Q. Can you place it with reference to the date of the particular transaction we are now talking about; in other words, the sale to Consolidated?

A. Wait. I time these things by where I was at the time, and we had moved into the house around June, 1955, so it was probably in the fall of 1955.

Q. In other words— A. No, 1956.

Q. In other words, it would be then—

A. Probably about the fall of 1956, I think, because that is when we would be buying topsoil.

Q. A little over two years after the sale to Consolidated?

A. A year and a half, I guess. February, 1954—1955—

Q. About two and one-half years. Now, how were you first [64] advised of this proposed sale of topsoil?

A. A memorandum had come around saying an offer had been made on the topsoil and was it agreeable to sell it at this price.

Q. That memorandum was issued by whom?

A. I believe by Mr. Williams.

Q. Mr. Williams individually?

A. I don't remember.



(Testimony of Lois W. Rosebrook.)

Q. As far as other decisions with respect to the use of the land, in what manner were those made?

A. The decisions that were put up to the members, the tenants in common, would come out in a memorandum.

Q. And again, who prepared that memorandum or those memoranda?

A. I don't know who put all the facts together. Many times it would come from my father.

Q. It came from your father? Other than the topsoil did you object to anything else that occurred?

A. No, I don't believe so.

Q. Now, you mentioned something about suggesting meetings at the home of your father, or meetings that took place at the home of your father at your suggestion, to discuss the investments that were distributed to you. With respect to this particular transaction what, if anything, was discussed at those meetings? [65]

A. As I said, I don't recall too much after the trust was actually dissolved aside from explaining that I had my own share and could do with it as I wanted until this actual discussion about selling it, which was at the end of January or beginning of February 1954.

Q. Now, you also stated that you exercised independent judgment as to this sale. On what facts was that judgment based so far as the respective value of the land?

A. So far as the value I went on my father's opinion, and so far as deciding to sell, if you could make double your money that sounded fine.

(Testimony of Lois W. Rosebrook.)

Q. But you made no independent inquiry on your own as to the value of your particular interest?

A. Not so far as going out to have it appraised, no.

Q. Do you know how the price was arrived at that was offered for this acreage?

A. Well, as I remember the thing, it was that after the trust had been dissolved and I received my share, and I think as discussions went on—the land was bought with the idea that it could be worth more or would be worth more than the price that it was bought at, and at the time it was sold I figured, with my father's opinion, this was a good thing.

Q. You said that—maybe I misunderstood, but did you say that the land was bought with the expectation that the price would be more than was paid for it? [66]

A. No, I said—I don't think I know what you said. I'm sorry. I think that when the trust was dissolved it was explained to me that the land was bought at what they thought was a very good price. In other words, I believe Mr. Williams, my father, felt that it was worth more at the time than what he paid for it.

Q. Did he say anything else about what the land was worth or what was contemplated at the time it was purchased?

A. No. So far as I recall, it was held for an investment because sometime they were going to run out of flat lands to build on.

Q. Between the time that the trust was dissolved and the date of your sale of the interest in Consolidated Lands Company did you make any other sales of any of the investments in the trust? A. No.

(Testimony of Lois W. Rosebrook.)

Q. What was your next transaction after the sale made to Consolidated Lands Company with respect to the former trust assets?

A. I think that was the early part of 1956 when the Navy condemnation suit went through and they condemned about 53 acres.

Q. In other words, for a period of about two years the only transaction was this sale to Consolidated Lands?      A. That's right. [67]

Q. I believe you stated in your direct testimony that you valued your father's opinion in investments quite highly. I am paraphrasing it, but I believe that was the general tenor of your testimony; is that correct?

A. Yes, he has done very well.

Q. Have you on any occasion refused to follow his recommendations or handling of the former trust property?      A. No.

Mr. Carico: May I see Plaintiff's last two exhibits, please?

Q. Now, I notice on Plaintiff's Exhibit 2, on the last page thereof, I believe this is your signature; is that correct?      A. That's correct.

Q. And would you read what appears just above the signature lines?      A. You mean up there?

Q. Yes.

A. "The undersigned hereby approves the foregoing accounting and consents to the expenditures as described therein."

Q. Would you examine the disbursements reflected on pages 1 and 2 for a second, please?      A. Yes?

Q. With respect to the disbursements appearing on

(Testimony of Lois W. Rosebrook.)

pages 1 and 2, were you consulted prior to the time any of those [68] payments were made?

A. Memorandums would come around on the tax bills and the amount we would have to pay the First Western Bank on interest especially.

Q. So that interest on tax bills would be substantially all that—

A. (Interposing) All that I can recall. Unless these other things were lumped in such as payroll, secretarial overtime, and so forth. I can't recall that as such.

Q. Do you know who authorized those expenditures originally, other than the tax bills and the interest payments? A. Not as an individual, no.

Q. Now, with respect to this sale of—I believe it is commonly referred to as the "Navy property," the condemnation sale—you stated on direct examination that that was given capital gains treatment on your income tax returns? A. That is true.

Q. At the time you received the assets of the trust what were you told, if anything, was the reason for retaining just this particular piece of property; in other words, the Navy property?

A. At the time I received the trust I don't think anything was said about retaining just that part of the property.

Q. At the time of the sale to Consolidated Lands, then, what if anything was said about the reason that this particular [69] piece of property wasn't—

A. There were negotiations for a lease on the Navy property. I guess they had had it for a dollar a year

(Testimony of Lois W. Rosebrook.)

for so long that they decided to condemn it and not pay so much more, as they originally did. But I believe the original 884 acres of that, that was all they wanted.

Q. At the time of the sale to Consolidated wasn't there also a piece of land retained for shopping center purposes? A. Retained by whom?

Q. I am sorry, by the group?

A. You mean the tenants in common kept that apart?

Q. Retained a part for use as an eventual shopping center?

A. I don't think it was ever explained to me there was 80 acres, which is the part you are talking about, that was kept out for that purpose.

Mr. Carico: I have no further questions, Your Honor.

#### Redirect Examination

By Mr. Brenner:

Q. Mrs. Rosebrook, did you ever look to anyone else for investment advise of any sort besides your father? A. Yes.

Q. Who?

A. I have consulted with my husband and also talked to one or two brokers as far as investment possibilities.

Mr. Brenner: I have no further questions. [70]

The Court: All right.

(Witness excused.)

Mr. Brenner: I would like to call George W. Williams as my next witness.

GEORGE W. WILLIAMS,

called as a witness by the plaintiff, being duly sworn,  
testified as follows:

The Clerk: Please state your name and occupation  
to the Court.

The Witness: George Wesley Williams.

Direct Examination

By Mr. Brenner:

Q. What is your address, Mr. Williams?

A. 3205 Ralston Avenue, Hillsborough, California.

Q. What is your occupation, Mr. Williams?

A. Well, I am an officer of a corporation.

Q. Does this constitute the majority of your income and take up the majority of your time?

A. Yes, sir.

Q. In December of 1953, Mr. Williams, were you the trustee of a trust for the benefit of the plaintiff in this case?

A. Yes, I was.

Q. Generally speaking, what was the nature of the trust assets at that time?

A. Well, the trust assets consisted of some real estate [71] holdings and some stock in some corporations.

Q. Would you expand upon the real estate holdings a bit and tell us what they constituted?

A. Well, there was a—what we call the Ford Building or a building rented to the Ford people, and also a building rented to the Buick people, the Buick agency in San Bruno, and the trust had an interest in some San Bruno land property.

Q. Focusing on the interest in the San Bruno land



(Testimony of George W. Williams.)

property, would you elaborate on that a little bit more?

The Court: You can ask him leading questions so we can get on with it.

Mr. Brenner: Thank you.

Q. I think it was stipulated, Mr. Williams, in the record that the trust had a one percent interest in 1159 acres in real property in San Bruno. Does that agree with your memory? A. Yes, it does.

Q. How did the trust acquire this interest in that property?

A. Well, at the time that I was negotiating for the acquisition of the entire property with the Mills Estate and with people to acquire an interest, as trustee I included a one percent interest in the purchase of the property in this particular trust.

Q. When was that?

A. In 1953. About May, I guess. [72].

Q. What was the solvency or cash position of the trust in May, 1953?

A. Well, I would say the trust had cash or bonds in excess of \$10,000, plus its various real estate holdings and stocks.

Q. Do you know how much cash it actually had, or approximately?

A. I don't recall the exact amount. I would say over 10,000.

Q. We have stipulated, Mr. Williams, that the interest was actually acquired by purchase of the stock of San Bruno Lands Company and then the dissolution of the San Bruno Lands Company and distribution to the tenant in common. Does that meet with your memory?



(Testimony of George W. Williams.)

A. The interest of the trust was paid for in cash.

Q. Do you know how title was taken?

The Court: To what? The stock?

Mr. Brenner: Q. To the underlying land?

A. Well, initially title to the land was taken in three trustees who were acting for a group participating in the purchase of the whole property.

Q. What was the purpose of that, do you know?

A. We were only able to purchase the land by purchasing the corporation which owned the land, and the owners of stock made it a condition that they would not negotiate the sale with over [73] two or three people.

Q. Who were those people?

A. The ones who were acting in that capacity for the purchase were Martin Wunderlich, Andrew Conway and myself.

Q. Then how did title ultimately devolve into the trust?

A. The corporation was immediately liquidated and the real property was transferred to the three trustees, in effect, which I have mentioned, or three agents, and they in turn immediately quit-claimed their interest in the property in accordance with the agreement with the others who were to participate in the proposition that they were to participate in.

Q. How did you, as trustee, take title on behalf of the trust; do you recall?

A. I took title to this property in my own name as trustee for my daughter Lois.

Q. In your fiduciary capacity as trustee, Mr. Williams, what was your purpose in making this purchase?

(Testimony of George W. Williams.)

The Court: What purchase? The purchase of the San Bruno Land Company, or the stock?

Mr. Brenner: I am sorry, Your Honor.

Q. The purchase of the trust interest in this investment.

A. Well, I was hoping to make a very good investment for my daughter.

Mr. Brenner: Q. Would you enlarge upon that a bit?

The Court: Well, I get it. That's all right. [74]

Mr. Brenner: Q. What factors in particular made you think it was a good investment?

A. Well, I was very familiar with the land in this area and with the development of the Peninsula in particular and I realized that the flatter lands which had been developed up to that time, were becoming very scarce, and I considered this property, which involved some hilly land as well as some strategic land suitable for a shopping center, to be very reasonably priced on the basis of the price quoted, and I just thought it was a good investment—a very good investment.

Q. As trustee, in your fiduciary capacity, what relationship with the other investors did you intend to enter?

Mr. Carico: Objection, Your Honor.

The Court: Sustained. You can go into the agreements and conversations if you wish.

Mr. Brenner: Q. Mr. Williams, do you know how the agreement or the deeds describes your relationship with the other investors?

The Court: Have you got the deed or agreements?

(Testimony of George W. Williams.)

Mr. Brenner: They are not in evidence, Your Honor.

The Court: All right.

The Witness: Well, the property was to be acquired in an undivided interest and we would all be free agents.

Mr. Brenner: Q. Focusing on the distribution, now, to the trust of this one percent interest, Mr. Williams, how was [75] that mechanically done?

A. The trusts were dissolved by deeding out the land directly from me as trustee to my daughter, and by making suitable documents transferring any personal property, assigning personal property to her from me as trustee.

Q. Did she indicate her willingness to accept this property at that time?

A. Yes, sir.

Q. How did she do that?

A. Well, the property was documented and I told her I was giving up the trust and the property that she would receive and what her obligation would be, and she agreed to accept the property.

The Court: What do you mean, what her obligation would be? What did you say to her in that respect?

The Witness: Well, in connection with taking over the property I explained that from the time she took it on it was her responsibility and she would have to look after it.

Mr. Brenner: Q. Do you have personal knowledge that the deed you referred to distributing the property

(Testimony of George W. Williams.)

out of the trust to Lois W. Rosebrook was personally delivered to her?      A. Yes, sir.

Q. At that time did you attempt to familiarize Lois W. Rosebrook with the asset picture of the trust and the assets which would then be distributed to her? [76]

A. Yes, I described them in detail and told her about the properties and the problems of management and tried to convey as much information with respect to them as I could.

Q. How was this done?

A. Well, as to Lois, I explained to her at a separate meeting and then subsequently we had family meetings at which I elaborated on the management of property, et cetera.

Q. When you distributed the assets out of the trust did you attach any conditions to the distribution at that time?

A. No, there were no conditions.

Q. Either oral or written?

A. There were no conditions whatsoever.

Q. Was there an understanding that you would still be able to effectively control the use or distribution of this property?      A. No.

Mr. Carico: Objection. That is speculative.

The Court: Well, technically, I suppose, what the understanding was is a conclusion. You can ask what was said and done between them.

Mr. Brenner: Q. Was there anything said about what their obligations were with regards to this property?

A. Well, of course, that they were to take care of

(Testimony of George W. Williams.)

it, to manage the property, and they had no further obligations.

Q. Was anything said in regard to what you—well, was [77] anything said that you still expected to have some degree of control over this?

A. No, quite the contrary, I told them it was their full responsibility.

Q. Did you have a power of attorney with Lois W. Rosebrook, either in her present name or her prior names, as grantor and you as grantee at that time?

A. No, sir.

Q. Do you have now? A. No, sir.

Q. Have you ever had? A. No, sir.

Q. We have stipulated, Mr. Williams, that the plaintiff, Lois W. Rosebrook, sold an interest in a portion of the acreage on February 10, 1954. Did you and the plaintiff discuss the impending sale?

A. Yes, sir.

Q. Do you know when you first discussed that with her?

A. Well, I imagine it was just prior to the sale.

Q. Generally, what did you tell her at that time?

A. Well, I told her that the property was contemplated to be sold, that it was the hilly portion of the property, and that it could be sold for approximately twice the price paid for it, and that I thought it was a suitable deal for her.

Q. How many acres were involved in that sale at that time, do you know? [78]

A. Approximately 860.

The Court: When you entered into the agreement



(Testimony of George W. Williams.)

in April, 1953, with these associates, were those written agreements, the two agreements of April, 1953?

A. The only written agreement was in connection with the agreements having to do with the actual purchase, which were common agreements with the seller. I don't recall any—

The Court: (Interposing) I mean the two agreements which you signed or which you made in April, 1953, with Burrows, Conway, Wunderlich, Culligan and so forth, regarding the purchase of stock on the San Bruno Land Company and regarding the intention to hold for six months and then sell it to a corporation for development. There were two agreements in which that general idea was contained, is that true?

The Witness: No. As regards the purchase of the property, the only agreements in connection with the purchase had to do with the cost of the property and how the corporation would be liquidated and how the property would get back to the individuals.

The Court: All right. Were those agreements in writing?

The Witness: Well, that particular agreement was the particular agreement to buy and sell, and that was in writing.

The Court: Counsel, you know what I am getting at, don't you? [79]

Mr. Brenner: Yes.

The Court: Are there two written agreements in existence?

Mr. Brenner: No, Your Honor. There is a written agreement dated April 23, 1953.

The Court: Yes.



(Testimony of George W. Williams.)

Mr. Brenner: There is also a piece of paper which purports to be a memo dated April 23, 1953.

The Court: All right. Are they in evidence yet?

Mr. Brenner: No, Your Honor, they are not.

We contend that insofar as the plaintiff in this case is concerned they are completely immaterial and irrelevant.

The Court: Well, I was going to ask, did the trust as such appear as a party to those agreements?

Mr. Brenner: Yes, they did, Your Honor. To one of them, Your Honor. To the one which purports to be an agreement.

The Court: All right.

Mr. Brenner: Q. Mr. Williams, I show you now a document entitled "Agreement."

The Court: Pardon me, counsel. I am not importuning you to offer them now. You can use your own judgment.

Mr. Brenner: These are subsequent documents, Your Honor.

Q. —which is marked Exhibit 6-F to the stipulation which we entered into here today. Can you tell us briefly what that [80] purports to be?

A. Well, this agreement appears to be an agreement covering the sale to Consolidated Lands, Incorporated.

Q. The sale to Consolidated Lands, Incorporated?

A. Yes, sir.

Q. What is the date of this agreement?

A. February 10, 1954.

Q. Now, I am indicating now a signature which

(Testimony of George W. Williams.)

purports to be that of Lois Hortense Williams Aull. Do you know personally that Lois Hortense Williams Aull signed that? A. Yes, I do.

Q. Do you recognize that as her signature?

A. Yes, sir.

Q. And is she the plaintiff herein?

A. Yes, sir.

Q. Now known as Lois W. Rosebrook?

A. Yes.

Q. Now I show you what purports to be a grant deed marked Exhibit 7-G to our stipulation which we have entered herein, and ask you to briefly describe that.

The Court: You don't have to describe it. Just identify it. We can look at it.

Mr. Brenner: It's the deed which conveyed the 884 acres from the tenants in common to Consolidated Lands.

The Court: Is that in evidence? [81]

Mr. Brenner: Yes, it is.

Mr. Carico: Your Honor, we will stipulate that it was signed by the plaintiff in this case, Mrs. Rosebrook.

Mr. Brenner: That is all I wanted.

The Court: All right.

Mr. Brenner: Q. Referring, Mr. Williams, to the family meetings which you testified were held, at whose instigation were they started or at whose suggestion?

A. Well, the meetings were—the idea of the meetings was suggested by Lois, my daughter.

Q. We have stipulated that originally 1159 acres were acquired and subsequently evidence has been intro-

(Testimony of George W. Williams.)

duced that 884 of those acres were sold February 10, 1954. Subsequent thereto were there any sales of the underlying land?

A. Subsequently we sold 80 acres to Consolidated Lands, a shopping center site.

Q. And when was that?

A. I don't recall the exact date.

The Court: August, wasn't it, 1954?

Mr. Brenner: Yes. We have stipulated to August, 1954—1956, Your Honor.

The Court: I beg your pardon; 1956.

Mr. Brenner: Q. Do the tenants in common still hold any of the underlying land of the 1159 acres?

A. Yes, they own the more level land, the more centrally located land which is particularly suitable for an investment [82] type building.

Mr. Brenner: I have no further questions at this time, Your Honor.

#### Cross-Examination

By Mr. Carico:

Q. Mr. Williams, you are the father of the plaintiff, Mrs. Rosebrook, herein, is that correct?

A. I am.

Q. Are you presently yourself involved in a dispute with the Internal Revenue Service involving your particular share of the sale of this land to Consolidated Lands Company?

Mr. Brenner: Objection on the grounds that it is immaterial and irrelevant to this taxpayer.

The Court: What is the purpose of this?

(Testimony of George W. Williams.)

Mr. Carico: Well, Your Honor, it does raise this point: Mr. Williams, I am sure—

The Court: (Interposing) What is the purpose of it?

Mr. Carico: To demonstrate that his answers admittedly may be used against him as admissions.

The Court: In other words, you want to impeach his testimony by showing his interest?

Mr. Carico: Showing his interest and—

The Court: All right. Go ahead, I will allow it.

The Witness: What was the question again?

Mr. Carico: Well, will the reporter please read it back? [83]

The Court: Reframe it and save time.

Mr. Carico: All right.

Q. Are you presently involved in dispute with the Internal Revenue Service regarding your sale, or your portion of the sale, to Consolidated Lands Company?

A. I would say so, yes.

Q. And you recently testified in a Tax Court hearing involving a sale concerning your other daughter, Mrs. Barryman?

A. Yes, sir.

Mr. Brenner: Objection, Your Honor, that is immaterial and irrelevant to this taxpayer.

The Court: Overruled for the limited purpose for which he is asking it. Go ahead. He has answered it already.

Mr. Carico: Q. Mr. Williams, you stated that your occupation was that of an officer of the corporation. Are you an officer of G. W. Williams Company?

A. Yes, sir.

(Testimony of George W. Williams.)

Q. You own a 50% interest in G. W. Williams Company?      A. Yes, sir.

Q. What type of business is G. W. Williams Company?

A. Well, its principal business now is mortgage loans and investment in shopping center and apartment house property.

Q. Was G. W. Williams Company in business in 1953?      A. Yes, sir.

Q. What was its business at that time? [84]

A. Well, the same business except for the mortgage loan part of it, and I don't recall whether or not we had stopped building houses in 1953 or not, but it was about that time we stopped building houses.

Q. Previous to 1953 you had been, in, say, the residential development business?

A. Yes, I think that would cover it.

Q. Are you also interested in the firm of Williams & Burrows?      A. Yes, sir.

Q. What type of organization or corporation or partnership is Williams & Burrows?

A. It's a corporation and it—

The Court: Pardon me just a minute. What company is this?

Mr. Carico: Williams & Burrows—B-u-r-r-o-w-s.

The Witness: It is a corporation, and it is a general contracting company.

Mr. Carico: Q. Have you ever been, or are you presently a member of the partnership known as American Homes Company?

A. American Homes Company is a corporation.

(Testimony of George W. Williams.)

Q. This is as distinguished from American Homes Development Company. Was there ever a partnership known as American Homes Company in which you were interested?

A. American Homes Company is a corporation.  
[85]

Q. Possibly my notes are wrong. What type of business is American Homes Company?

A. Well, I would say it's an investor in real property.

Q. Does it build homes? A. No, sir.

Q. It buys real property? A. Yes, sir.

Q. Sells real property?

A. Well, it hasn't sold much, but it has bought and sold property.

Q. Are you also interested in Hallmark Homes, Incorporated? A. Yes, sir.

The Court: Hallmark?

Mr. Carico: Hallmark.

The Court: Well, you didn't tell me whether he is interested in the American Homes Company.

Mr. Carico: There seems to be some confusion in my own notes about that, Your Honor.

The Court: All right. Let's get on to something.

Mr. Carico: Q. Is Hallmark Homes—what type of business is Hallmark Homes in?

A. Hallmark Homes is a corporation that has investments.

Q. Does Hallmark Homes participate in a joint venture known as Luego San Bruno?

Mr. Brenner: Objection, Your Honor. This is irrelevant. [86]



(Testimony of George W. Williams.)

The Court: Well, it is all irrelevant so far as I am concerned. You haven't even shown that he has any connection with those places.

Mr. Carico: I have asked, I believe, Your Honor—I have prefaced each question with whether he is interested in it.

The Court: "Interested in" doesn't mean anything. He might be interested in art. Let's find something out about it.

Mr. Carico: Q. As to G. W. Williams Company then, you own 50% of that, is that correct?

A. Yes.

Q. You are an officer of the corporation?

A. Yes, sir.

Q. You are a director of the corporation?

A. Yes, sir.

Q. As to Williams and Burrows, what is your percentage of ownership in that?

Mr. Brenner: Your Honor, I am going to object on the grounds that it is completely immaterial how much interest this gentleman owns in those companies when the taxpayer here is Lois W. Rosebrook.

The Court: It may be. All right. Overruled. Go ahead.

Mr. Carico: Q. As to Williams & Burrows, how much interest do you own in that? [87]

A. Oh, I think in it individually it is probably 20 or 30 percent. I don't recall my individual ownership in that company.

Q. You are a director of that firm? A. Yes.

Q. You are an officer of that firm?

A. Yes, sir.

(Testimony of George W. Williams.)

Q. American Homes Development Company, you are a 50% stockholder in that firm or corporation?

A. I believe so, yes, sir.

Q. You are an officer of that corporation?

A. Yes, sir.

Q. You are a director of that corporation?

A. Yes, sir.

Q. Hallmark Homes, Incorporated, what is your percentage of ownership in that?

A. Well, I don't recall exactly.

Q. Are you an officer of Hallmark Homes, Incorporated?

A. Yes, sir.

Q. You are a director of Hallmark Homes, Incorporated?

A. Yes, sir.

Q. Now, in connection with your activities with the aforementioned corporations, have you negotiated for the purchase of various tracts of land?

Mr. Brenner: Your Honor, I am going to object on the [88] grounds that whether he has negotiated for the purchase of tracts of land is completely irrelevant and immaterial to the taxpayer here, who is the plaintiff in this case.

The Court: Well, it may be immaterial to the ultimate decision, but it may affect some issue. Overruled.

The Witness: Well, as an officer of the corporation I have had something to do with the negotiations, and negotiations might have been made by other employees but I have a chance to look at them at some stage.

Mr. Carico: Q. You have also supervised the development and improvement of certain areas and tracts of land owned by these corporations?

(Testimony of George W. Williams.)

Mr. Brenner: Same objection, Your Honor. I think we are getting further afield all the time.

The Court: We are.

Let's bring it around and get right down to the point and we will allow it.

Mr. Carico: Q. Have you negotiated for the sale of land in these aforementioned corporations?

Mr. Brenner: Same objection, Your Honor.

The Court: Overruled. Go ahead.

A. Well, where any properties have been sold I would have had to approve the sale.

Mr. Carico: Q. All right, fine. Now, you stated that in 1953 you acquired on behalf of the corporation a one percent [89] interest—I mean in behalf of the trust, a one percent interest in what is known as the San Bruno Land, or land formerly owned by the San Bruno Lands Company. Was that interest acquired—well, strike that.

The Court: No, don't strike it. It is fine so far as it goes. Go ahead.

Mr. Carico: Q. That interest was acquired acting under your own discretion as trustee, is that correct?

A. Yes, sir.

Q. Under the trust agreement you had unlimited discretion as trustee? A. Yes, sir.

Q. When was that idea first formulated in your mind to acquire the land owned by San Bruno Lands Company?

Mr. Brenner: This is immaterial and irrelevant to this taxpayer, Your Honor.

(Testimony of George W. Williams.)

The Court: It doesn't add much to me, who formed the idea. Let's find out what he did.

Mr. Carico: All right.

Your Honor, may I be heard respecting this for a second?

The Court: Go ahead, we will hear it.

Mr. Carico: Q. When did you first formulate the idea of acquiring the land belonging to the San Bruno Land Company?

A. Well, I think I learned of it somewhere from six months to a year prior to the sale, that it was available, and [90] then is when I started working on it.

Q. That would be late in 1952?

A. I would say so.

Q. Would you say that you were the moving party in getting together the group of persons to purchase the land?

Mr. Brenner: I am going to object to that, Your Honor. There has been no testimony about any group. This is, so far as I know, the first time the word "group" has been mentioned.

The Court: I know. It's all right. It will work out. Go ahead.

Mr. Carico: Your Honor, on direct examination he mentioned the word "group."

The Court: Go ahead, please.

Mr. Carico: Q. Were you the moving party in getting together the group to acquire this land?

A. I would say so, yes.

Q. And who were the major parties you brought together to provide the financing for this acquisition?

(Testimony of George W. Williams.)

Mr. Brenner: Same objection, Your Honor, irrelevant and immaterial to this taxpayer, who is the one party here.

The Court: Overruled. Go ahead. Isn't this stipulated to? No mystery about it is there?

Mr. Carico: No, Your Honor, it is not stipulated to.

The Court: Go ahead, then.

The Witness: Well, there were a number of parties, but [91] the parties with the larger interests were Martin Wunderlich and Conway & Culligan and—

Mr. Carico: Q. Frank Burrows?

A. Frank Burrows participated and I participated and the trust participated.

Mr. Carico: May I have this marked as Defendant's Exhibit next in order?

(Copy of agreement marked Defendant's Exhibit A for identification.)

Mr. Carico: Q. Now, in your direct testimony you made reference to an agreement entered into by these parties for the purchase of the stock of the San Bruno Land Company.

I ask you to examine this document here.

Mr. Carico: Incidentally, Your Honor, there has been a stipulation among counsel in this case that copies are permissible throughout.

The Court: All right. If there is any question about it, just ask him if that is his signature and identify it and offer it.

Mr. Carico: Q. Does your signature appear on this document, Mr. Williams? A. Yes, sir.

Q. Is this the agreement you referred to in your

(Testimony of George W. Williams.)

direct testimony regarding the acquisition of the San Bruno Lands Company stock? [92]

A. Yes, sir.

Mr. Carico: May I offer this as Defendant's Exhibit A in evidence.

Mr. Brenner: No objection, Your Honor.

(Defendant's Exhibit A for identification received in evidence.)

The Court: That is one of the agreements of April 23rd, is that correct?

Mr. Carico: That is one of the agreements of April 23rd, yes, Your Honor.

The Court: Let me take a look at it. Go right ahead.

Mr. Carico: Q. Now, at the time this particular agreement was entered into or executed did you and the other members of the group discuss your subsequent plans to develop the property?

Mr. Brenner: Objection, Your Honor. Whether or not they had any plans or had any discussions in regard to plans is irrelevant and immaterial and hearsay as to this taxpayer. Before they can introduce such evidence they have to lay a foundation for the existence of a partnership or joint venture or some other relationship before it becomes relevant to this taxpayer.

Mr. Carico: Your Honor, may I be heard on this?

The Court: No. Overruled. Go ahead.

The Witness: May I have the question again? [93]

Mr. Carico: Q. At the time the agreement that is now in His Honor's hands was executed did you and the other members of the group also discuss what your



(Testimony of George W. Williams.)

plans were with respect to this property that was ultimately to be acquired?

The Court: Pardon me, just one question before that. This agreement of April 23rd, which you just looked at, in the amounts of money referred to in the agreement is included, I take it, such amount of the trust funds as would constitute one percent of the purchase price, is that correct?

The Witness: Yes, sir, that is correct.

The Court: All right, go ahead.

The Witness: Well, the group, as such, discussed the property and its potential very carefully and considered any number of possibilities which were related to the income which we might expect to receive and whether or not we were able to receive enough income to carry the property for a certain length of time, and all that sort of thing. Yes, sir, we considered it very carefully.

Mr. Carico: Q. As a result of those considerations did you reduce your verbal agreement to writing?

A. We didn't have a verbal agreement as to all of the considerations.

Q. Mr. Williams, I will ask you to look at—excuse me.

Mr. Carico: I will have this marked as Defendant's Exhibit next in order. [94]

(Certificate dated April 23, 1953, marked Defendant's Exhibit B for identification.)

Mr. Carico: Q. Would you examine this document and tell me if your initials appear on page 1 thereof?

Mr. Brenner: Your Honor, I am going to object

(Testimony of George W. Williams.)

to that document. Counsel hasn't shown it to me yet. I think I know what it is.

The Court: Show it to him.

Mr. Carico: I just asked counsel before I introduced it, Your Honor.

Mr. Brenner: Anything that they might have reduced to writing of the Commissioner, I cite the case of *Niederkrome v. the Commissioner*, decided by the Ninth Circuit recently, where they held that the minutes of an executive committee meeting of the company other than the taxpayer was hearsay as to the taxpayer.

I also cite *Standard Oil vs. Moore* in this connection.

The Court: It may be. However, overruled. Go ahead.

Mr. Carico: Q. Do your initials appear on page 1 of that agreement, Mr. Williams? A. Yes, sir.

Q. Your initials appear on page two of that document? A. Yes, sir.

Mr. Carico: Your Honor, I offer this as Defendant's Exhibit B in evidence. [95]

The Court: What is that?

Mr. Carico: This is a memorandum of the verbal understanding of the parties as to what was to be done with this property.

Mr. Brenner: Your Honor, I object to its admission on three grounds, that is hearsay, that it is irrelevant, and that it is immaterial.

The Court: Overruled. It might not be important in the ultimate decision, but in view of this agreement and that funds of the trust were included in it, I will allow it.

(Testimony of George W. Williams.)

Mr. Brenner: Does Your Honor consider it necessary for counsel to take an exception to your ruling?

The Court: Your exception will be noted.

Mr. Brenner: Thank you.

Mr. Carico: Your Honor, may I interject this one point here?

The Court: No. Just proceed.

(Defendant's Exhibit B for identification received in evidence.)

The Court: Well, let's take five minute's recess.

(Short recess.)

Mr. Carico: Q. Now, after the purchase of the San Bruno Land Company stock, the corporation was liquidated and you and Mr. Wunderlich and Mr. Conway took title to the land as tenants in common, is that correct? [96]

A. Yes, sir.

Q. In order to accomplish this purpose or this acquisition did you obtain some temporary financing from a San Francisco bank?

A. In the acquisition we acquired temporary financing from the American Trust Company and the San Francisco Bank advanced some of the permanent financing later.

Q. How much was advanced by the American Trust Company?

A. Well, as I recall, their original loan was around \$750,000 which was paid immediately upon completion of the purchase of the stock, and then the land was encumbered and some of the funds from that helped to pay out these other charges.

(Testimony of George W. Williams.)

Q. Now, with respect to the financing obtained from the San Francisco Bank, was that obtained on a 5-year note?

A. No, as I recall it was on a short-term basis. I am a little hazy on that, but I know the conditions were very severe and I think the note only ran for one year.

Q. A 1-year note? What was the amount of that note?

A. The total was supposed to be \$500,000, I think, and a lesser amount was advanced.

Q. It was four hundred and fifty thousand—(inaudible to the reporter).

A. It was a lesser amount, as I recall it.

Q. Now, on June 8, 1953, did you, Mr. Wunderlich, Mr. Conway [97] quit-claim the land acquired from the San Bruno Lands Company to the entire group of tenants in common?

A. We quit-claimed and I believe that is the date, yes, sir.

Mr. Carico: May I have this marked?

(Document entitled Quit-Claim Deed marked Defendant's Exhibit C for identification.)

Mr. Carico: Q. Here are a couple more documents for you to look at. Will you tell me whether your signature appears on page 2 of that document?

A. Yes, it does.

Q. Is that the deed by which you conveyed the undivided interests to the group?

A. It appears to be a copy of a deed, yes.

(Testimony of George W. Williams.)

Mr. Carico: I offer this as Defendant's Exhibit C in evidence.

Mr. Brenner: No objection.

(Defendant's Exhibit C for identification, received in evidence.)

Mr. Carico: Will you mark this, please?

(Document, Assignment of Leases, marked Defendant's Exhibit D for identification.)

Mr. Carico: Q. Now, on that same date did you also execute an assignment of the leases held by San Bruno Land Company and acquired by yourself and Mr. Wunderlich and Mr. Conway to the other tenants in common? [98]

A. We executed an assignment and I presume it was on the same date.

Q. Would you examine this document and tell me if your signature appears on page 2 thereof?

A. Yes, sir, it does.

Q. Is that a copy of the assignment of leases, Mr. Williams? A. Yes, sir.

Mr. Carico: I will offer this as Exhibit D in evidence.

Mr. Brenner: No objection.

(Defendant's Exhibit D for identification, received in evidence.)

Mr. Carico: Q. Mr. Williams, at the time the quit-claim deed and the assignment just referred to were executed, did you, Mr. Conway and Mr. Wunderlich receive from the entire group of tenants in common

(Testimony of George W. Williams.)

a power of attorney dealing with the handling of the land?

A. We had a power of attorney dealing with the leases and I presume it extended to the land. I don't recall it.

Q. Would you examine this document and tell me if your name appears on page 2 thereof?

A. Yes, sir, it does.

Q. And does your name also appear on page 2 as trustee for the trust of the present plaintiff herein?

A. Yes, sir, it does.

Mr. Carico: I offer this as Defendant's Exhibit next [99] in order in evidence.

Mr. Brenner: No objection.

(Document entitled "Power of Attorney" admitted in evidence as Defendant's Exhibit E.)

Mr. Carico: Q. Now, Mr. Williams, I believe you stated on direct examination that you made this investment or made this purchase on behalf of the trust because you considered it a good investment, is that correct? A. Yes, sir.

Q. What were the rentals produced by this land acquired from the San Bruno Land Company at the time?

A. Well, at the time of acquisition the rentals were very nominal.

Q. About \$615 approximately?

A. I was going to say 700. That is approximately right, yes, sir.

Q. And these were from leases to flower growers and sheep grazers or for agricultural purposes?



(Testimony of George W. Williams.)

A. The principal income was from agriculture and there was one dollar being paid by the Government for a very substantial part of the land—one dollar per year.

Q. That one dollar being paid by or on behalf of the United States Navy?      A. Yes, sir. [100]

Q. And that was for a portion of the land that was not later transferred to Consolidated is that right?

A. Yes, sir.

Q. These rentals were subsequently increased to roughly \$1,070, isn't that correct?

A. Immediately after the acquisition we raised all of the agricultural rentals, yes, sir.

Q. Effective in November, 1953?

A. Well, almost immediately after acquisition. As soon as we could. I don't recall the effective date.

Q. Mr. Williams, with respect to this property which you have characterized as a good investment I would like to ask if you know what the normal return on real property is in the Peninsula area south of San Francisco, investment real property?

A. Well, I don't think there is any such thing as a normal return. There are returns that people hope to get from property. A normal return would be, say 6% on some property and on others it would be 10%.

Q. It would not be lower than 6% though?

A. I would say on investment acquired with the expectation that it would pay less than 6%, it would not qualify as an investment unless it were expected that the property would appreciate fast enough to generate 6% or more.

Q. Do you know what the taxes were on this

(Testimony of George W. Williams.)

property [101] acquired from San Bruno Land Company?

A. I do not recall, no.

Q. After these transactions whereby San Bruno Land Company was acquired, dissolved and the land went to all the tenants in common, how was the property managed, the real property?

A. Well, the management of the real property was comparatively simple. In connection with the leases, why, the group, we sent them out notices, as I recall, advising of the increased rentals. We didn't have any manager of the property as such at all.

Q. Was a single bank account maintained for the property? A. Yes, sir.

Q. Were the rentals received from these agricultural leases deposited within that single bank account?

A. Yes, sir.

Q. Were expenses, other than taxes, paid from that bank account?

A. Yes, sir, minor expenses.

Q. What is that?

A. I say those were minor items. The tax was the principal item and very little was involved in connection with the handling of this property.

Q. Who gave the authorization to draw the checks for these disbursements for expenses? [102]

A. Well, I think the original committee had to give the authorization.

Q. Which committee is that? Yourself, Mr. Wunderlich, Mr. Conway and—

A. The ones that were delegated with the power of attorney to negotiate with respect to leases.

(Testimony of George W. Williams.)

Q. Mr. Williams, I show you the accounting introduced as Plaintiff's Exhibit 2.

A. Yes, sir.

Q. Would you tell me who prepared that accounting? Or let me clarify that: Who prepared the accountings during 1953 for the group?

A. Well, an employee of our company prepared the accounting.

Q. When you say "your company" you mean G. W. Williams Company?

A. G. W. Williams Company, yes.

Q. Now, with respect to the expenses, taxes on this property acquired from the San Bruno Land Company, in 1953 were those shared in proportion to the contributions or investments in the land?

A. Yes, I would say so. Taxes and everything were shared on the basis of their interest in the property.

Q. Now, with respect to this financing, did each of the tenants in common assume a proportionate share of the financing?

A. No, as I recall the Wunderlich trust didn't assume any [103] responsibility with respect to the financing.

Q. Did Mr. Wunderlich personally?

A. Mr. Wunderlich personally assumed the financing.

Q. After this land was acquired from San Bruno Land Company, didn't the group announce generally that it was available for sale?

A. No, sir, it did not. They were very careful about that because it was not for sale. If anyone had

(Testimony of George W. Williams.)

inquired they would have been told that it was not for sale.

Q. You did not consider a possible sale to a man by the name of Chris McKeon at one time?

A. We considered he might be an eventual purchaser, but after the acquisition of this property we advised it was not for sale. We were qualifying it as an investment to the best of our ability.

Q. Qualifying it in what respect? In tax respects?

A. Yes, sir.

Q. In October of 1953, were you, Mr. Wunderlich, Mr. Conway and Mr. Culligan, Mr. Burrows and I believe it is Boettcher Company instrumental in forming a corporation known as Consolidated Lands Company?

Mr. Brenner: Your Honor, I am going to object on the grounds that it is irrelevant and immaterial who are the shareholders or organizers of Consolidated Lands. The plaintiff here, Lois W. Rosebrook, has testified that she was neither a [104] shareholder, officer or director or in any way interested in Consolidated Lands, and it is immaterial who the shareholders were.

The Court: I have in mind her testimony that she had no connection with it. However, the objection will be overruled.

The Witness: As I recall, we did institute some sort of proceedings at about that time.

Mr. Carico: Q. Mr. Williams, I show you a document entitled "Articles of Incorporation of Consolidated Lands, Incorporated." Unfortunately, your signature does not appear thereon.

(Testimony of George W. Williams.)

Mr. Carico: Mr. Brenner, will you stipulate that this is a true copy of the articles of incorporation?

Mr. Brenner: Yes. I am making no objection to any of these documents under the best evidence rule.

Mr. Carico: This is unsigned, Your Honor.

Mr. Brenner: That's all right, too. Your Honor. sometimes the photographic process doesn't pick up the signatures but they are genuine copies.

Mr. Carico: Q. To the best of your knowledge, Mr. Williams, are these the articles of incorporation of Consolidated Lands, Incorporated?

A. Yes, sir.

Mr. Carico: I offer these as Defendant's Exhibit next [105] in order.

Mr. Brenner: I would like to record my objection to the articles on the grounds of immateriality, irrelevancy, and also that as to any recitals therein they are hearsay as to this plaintiff.

The Court: Yes, that is right, they would be hearsay. For the limited purpose shown—(inaudible to the reporter).

Mr. Carico: I am showing, Your Honor, that they follow exactly what they contemplated by that April 1953 memorandum.

The Court: All right. It may be admitted.

(Articles of Incorporation of Consolidated Lands, Incorporated marked Defendant's Exhibit F in evidence.)

Mr. Carico: Q. Mr. Williams, with respect to one of my previous questions, I asked you whether an announcement had been made that this land was available



(Testimony of George W. Williams.)

for sale. Possibly you misunderstood me. I would like to read you a portion of the transcript from the Tax Court trial involving your daughter, and ask you if this is not the statement which you made at that time:

“Mr. Brenner: Q. Mr. Williams, you have testified that you considered the possibility of a sale for the portion of this property. Did you fix in your own mind any timing for that sale?

“A. Well, as to this property we as members [106] of the group and individually acquired it definitely as an investment, looking forward to a capital gain, and we did not expect to entertain any offers that might be made to us and the time of which would not qualify the property for a capital gain.

“If any offers were to come in on this property, which was a possibility because an announcement had been made in event that it was available and we figured that others might be interested in offering an increase in price which might be acceptable to us in a reasonable length of time, but that was one of the considerations.”

Does that refresh your memory to any extent as to whether an announcement had been made that this property was for sale?

A. Well, in referring to “an announcement” I referred to the announcement of the purchase of the land by our group, and the land from the standpoint of investment properties and shopping center property and so forth, was available and has always been availa-



(Testimony of George W. Williams.)

ble for that purpose. I didn't mean to convey that the property was being offered for sale because it definitely was not.

The Court: Because what?

The Witness: It was not being offered for sale, definitely. [107]

Mr. Carico: Q. It was being retained to be sold to Consolidated Lands Company?

A. No, sir, it was not.

Q. Are you presently an owner of an interest in Consolidated Lands Company?

A. Yes, sir.

Q. Are you an officer of Consolidated Lands Company? A. Yes, sir.

Q. Are you a director of Consolidated Lands Company? A. Yes, sir.

Q. Now, Mr. Williams, on December 18, 1953, the trust for your daughter, Mrs. Rosebrook, was terminated, is that correct? A. Yes, sir.

Mr. Carico: May I see a copy of the trust agreement? I believe the only one we have is appended right here, the Declaration of Trust.

Q. Is it not correct that in establishing this trust you contemplated the termination on March 4, 1960, if you and your wife survived that long, or if either you or your wife survived that long?

A. Well, I don't recall the exact date. The trusts were terminated prior to the date we expected to terminate because of a ruling with respect to trusts which indicated the original purpose could not be achieved by continuing on the trust, and [108] that is the only

(Testimony of George W. Williams.)

reason they were terminated. It had nothing to do with this transaction whatsoever. [108-A]

Q. It was an income tax ruling or an estate tax ruling, or something like that?

A. Well, it was an estate tax ruling to the effect that trusts which were set up wherein the donor thereof was the trustee could not—that the property would still be included in the estate of the donor, and when that ruling came out, I wished to achieve the original objective of the trust, namely, to divest myself entirely of any interest in that property from an estate tax whatever.

Q. Now, when these assets were distributed to Mrs. Rosebrook, what did you tell her, if anything, with respect to this one percent interest in the former San Bruno Lands as to the value of it or the purpose for which it had been acquired?

A. Well, I told her this particular property had been purchased for investment, that I thought we had secured it at a very reasonable price, and that I was certain she could sell it for substantially more at some subsequent date.

Q. To your knowledge, what was the extent of Mrs. Rosebrook's familiarity with real estate investments and dealings at the time this property was distributed to her?

A. Well, I would say she had a general knowledge, being in a family where those matters were occasionally discussed, but I don't think she was an expert by any stretch of the imagination.

Q. Did she suggest, at the time this property was

(Testimony of George W. Williams.)

[109] distributed to her from the trust that family meetings be held concerning the manner in which the property should be handled and managed and organized?

A. Well, at the time or shortly thereafter she was somewhat concerned when I said that the properties were her responsibility and that she had to manage and look after it and prepare her own income tax returns, and so on, and so she thought it would be a good idea to get some further information and she suggested the family meetings which we have held from time to time since that date.

Q. In indicating her concern, did Mrs. Rosebrook state that she would like your opinion or recommendations on how the property was to be handled?

A. No, I don't recall her asking for my opinion on the matter at the time, but I am sure if she had any questions, why, she would ask me about them and I would answer her to the best of my ability.

Q. Do you know of your own knowledge if Mrs. Rosebrook thought highly of your recommendations and your business dealings in the handling of real estate?

A. Well, I hope she did. I don't know.

Q. Mr. Williams, isn't it a fact that at the time you distributed this trust you fully expected Mrs. Rosebrook would follow your wishes with respect to the San Bruno Lands?

A. Well, I hoped she would but I had no guarantee to that. [110]

Q. But you hoped she would?

A. Yes, I hoped she would. I thought it was a good deal.

(Testimony of George W. Williams.)

Q. Now, turning to the sale to Consolidated Lands in 1954, when was this first considered by the group?

A. Well, I can't say just exactly. When that was brought up, Conway and Culligan were interested in that line of procedure and the rest of us were not necessarily so. I don't recall the time.

Q. Do you happen to recall when a Mr. Orville Decker was requested to make an appraisal of this property to be sold to Consolidated Lands?

A. Well, I think that was sometime in 1954.

Q. How early in 1954?

A. I would say it must have been at or about the time of the sale of the property we would have secured that appraisal, I think.

Q. Have you experienced or have you had personal experience in appraising real property?

A. Yes, sir. I appraise them, not for other people, but for myself.

Q. Have you had any experience or have you examined any of these appraisal reports prepared, quite extensive, considering surrounding land and use to which the land can be put, offers on it, capitalized rate of return and items like that? Are you familiar with those? [111]

A. Yes, I am.

Q. Usually they are done up in a nice, fancy cover and—

A. I can't say I always agree with them, but I understand what they are getting at. On real estate everyone has to make their own appraisal based upon the information they have.

Q. Now, is that a process that can be done over

(Testimony of George W. Williams.)

night or within, say, one or two days, say, with a tract of land amounting to some 860 acres?

A. To an experienced investor, I would say that he might come closer to the true value of a piece of property than probably some of these M.A.I. appraisers who appraise it because he might have a little more vision than they do and realize the potential of a piece of property more than an appraiser might give credit to.

Q. You were a director and officer of the Consolidated Lands at the time it was purchased from the group?

A. Yes, sir.

Q. What was your title as an officer?

A. I was president of Consolidated Lands.

Q. Did you conduct negotiations on behalf of Consolidated Lands for the purchase of this property?

A. I had something to do with it, surely. All the members of the group participated in the negotiations because they all had to be satisfied.

Q. Did Mrs. Rosebrook know that you were president of [112] Consolidated Lands?

A. I don't know whether she did or not.

Q. Had she not been present at meetings held by Consolidated Lands, or at least waiting for you, as she put it, I believe, outside the door?

A. Well, it's a matter of timing. At sometime, why, she learned that I was president of Consolidated Lands, and she might have known it from the inception, but I don't recall at what time she acquired the information.

Q. Now, at the time— Well, strike that. You did present the proposal to Mrs. Rosebrook on behalf of or



(Testimony of George W. Williams.)

concerning the sale this some 885 acres to Consolidated Lands, did you not?      A. Yes, sir.

Q. At that time did she know that you were an owner and/or president of Consolidated Lands?

A. I am sure she did, yes, sir.

Q. Mr. Williams, how did the group arrive at the price that it asked for the property sold to Consolidated Lands?

A. Well, in connection with the determination of the price, I recall very definitely Mr. Wunderlich stating definitely that he would never sell a piece of property there for less than double what he paid for it. And in connection with dealing with a smaller piece of land, some of the rest of us at least had information as to the asking price of land in the area and [113] a price of \$2,000 an acre appeared to be right in line with the price being asked by adjoining land of comparable elevation and difficulty in handling.

Q. Mr. Williams, I show you Defendant's Exhibit B, a memorandum on which you have previously identified your initials. Would you read this sentence right here starting with "The development—"

Mr. Brenner: Your Honor, I am going to object to the reading into the record of anything in it, since I have already objected to the admission of the document itself.

The Court: All right, the objection will be overruled. Go ahead.

The Witness: "The development corporation will pay for said land an average of \$2,000 per acre, which sum may vary with the individual parcels, but which



(Testimony of George W. Williams.)

shall meet the average by the time all the property has been purchased."

Mr. Carico: Q. Mr. Williams, was any consideration given that statement at the time you set the \$2,000 purchase price?

A. I can't understand what you are getting at. Of course there was consideration given to it. In a piece of property of this kind some of that land is absolutely waste land and some land is suitable for development, and so you look at the land and you consider what parts can be developed and which parts are waste land, and from your knowledge of the property, [114] why, then you come up with a price that can be paid for the entire parcel.

Certainly there was consideration given to that. That's an average price for the entire piece. Some of it even now will never be developed, can't be developed.

Q. Do you know what the cost was of the 885 acres that was sold to Consolidated Lands Company?

A. Well, as I recall, it was about, netting it out, around eleven hundred, eleven hundred and fifty dollars an acre, the cost to the individual.

Q. Mr. Williams, was one of the members of this tenant-in-common group American Homes Development Company of which we have previously spoken?

A. Yes, sir.

Q. You are a director of American Homes Development Company?

The Court: He has already testified to that.

Mr. Carico: Yes, that's correct, Your Honor.

Q. Mr. Williams, would you examine this document

(Testimony of George W. Williams.)

entitled Special Board of Directors Meetings of American Homes Development Company, January 27, 1954? Does your signature appear thereon?

A. Yes, sir, it appears on the waiver of notice.

Q. Would you review the contents of the minutes of that meeting just briefly? [115]

A. Well, the meeting was called to discuss the proposed sale of the American Homes Development Company's interest in the portion of the land in which it had an interest at San Bruno.

Mr. Brenner: Your Honor, I object to the reading of this, and I am going to object to the admission of it on the ground that any recitals therein are completely hearsay as to petitioner, and also that any intent that American Homes might have had is completely irrelevant.

The Court: I think we are getting a little far afield now, don't we?

Mr. Brenner: Any intent that American Homes might have had is completely irrelevant as to this plaintiff here.

Mr. Carico: Your Honor, on that point Mr. Williams, while it is true that this is a statement from the minutes of a Board of Directors' meeting of American Homes Development Company, Mr. Williams was a director, he was present. This purportedly represents the minutes of those meetings, and while it does represent the intent of American Homes Development Company, it must also represent Mr. Williams' intent because he was—

The Court: Objection sustained.

(Testimony of George W. Williams.)

Mr. Carico: May I have this marked for identification?

(Document entitled Special Board of Directors Meeting, American Homes Development Company, Jan. 27, 1954, was marked Defendant's Exhibit G for identification.) [116]

Mr. Carico: Your Honor, may I be heard on this last document?

The Court: Why don't you take it up, continue with some other subject, and take it up at some other time? Mark it for identification and you can reserve it.

Mr. Carico: All right. I have concluded my cross-examination.

The Court: All right. Do you want to discuss this document?

Mr. Carico: Your Honor, this document is the expression by one of the members of the group, which I think we have sufficiently established that it acted to a certain degree in concert now. It contains an expression that this sale to Consolidated Lands Company is in furtherance of the intent expressed by Plaintiff's Exhibit B, namely, the memorandum entered into just prior to the acquisition of the property. I think it is necessary to tie the whole thing together.

The Court: It may be. There is no use bringing into this case involving this type of sale something involving an interest of another person. We have admitted sufficient concerning what the trustee did or did not do. I think that's going far afield.

Mr. Brenner: Your Honor, so far as we can see,

(Testimony of George W. Williams.)

there is no concert shown other than the usual manner in which [117] tenants in common operate or concert with one another.

The Court: Pardon me for just a minute. What are you offering to prove? Tell me, counsel, what are you trying to show?

Mr. Carico: Your Honor, in this case we are dealing with, under the Government's position, a joint venture or partnership.

The Court: What are you trying to show by this document?

Mr. Carico: To show that this was the intent of the group at the time of acquisition of the property.

The Court: Sustain the objection. I think we have gone far enough.

Mr. Carico: It is in, then, for identification.

The Court: Are you finished with this witness?

Mr. Carico: I am finished with this witness.

The Court: Do you have any questions? We might finish up with this witness, if you have.

#### Redirect Examination

By Mr. Brenner:

Q. Mr. Williams, there was admitted into evidence Defendant's Exhibit B, purporting to set out the intent of the parties in acquiring this property. Was that the only intent that you had? [118]

A. No. As I recall that document, it was merely one course of action that might be followed. Certain contingencies arose with respect to the property. We had a number of courses of action outlined to us and it depended as to which we would follow largely on the

(Testimony of George W. Williams.)

basis of the income we could generate on the property being acquired.

The Navy lease was the key to the whole situation. If they continued to pay us a rental, we could hold the property for some time, which was our expectation. If the lease fizzled out, why, then we had to follow another course of action.

Q. Did the lease fizzle out?

A. Yes, sir, it did.

Q. What other considerations were involved there?

A. Well, we had made a commitment to the San Francisco bank on a relatively short-term note, and the condition of that loan was that the funds that we secured in connection with this Wherry Housing project combination and the sale of an elementary school site were to be applied to the loan; and while we sold the elementary school site on a condemnation, the Wherry Act folded and the Navy, in effect, decided to not pursue its lease any further and so we didn't have any income to carry on and meet our obligations. We had to consider other means of handling the property.

Q. Mr. Williams, Exhibit B will reveal that it is [119] entitled Memorandum, and that it bears certain initials, including your own. Is it your practice to initial contracts in your course of business?

A. Well, only as respect to corrections. With respect to contracts, we make many verbal contracts in the contracting business, and with respect to written contracts, why, we sign our name. In the use of initials, it indicates that we have read it and we know the contents of it, but we wouldn't ordinarily write a document and

(Testimony of George W. Williams.)

say, "This is a contract," and then try to make it a contract by signing our initials. That just—well, we wouldn't do anything of the kind.

Q. Did you consider this Exhibit B entitled "Memo" a contract?

A. No, sir, it was not a contract and it was never considered as such.

Q. I ask you to observe Exhibit B for a moment, Mr. Williams. Does this refer to the petitioner, Lois W. Rosebrook, by her present or former name?

A. No, she is not identified in any way with this document.

Q. Did she sign it?

A. No, sir. I don't believe she has ever seen it, as a matter of fact.

Q. Do her initials appear thereon?

A. No, sir.

Q. Do you remember the background against which this [120] memorandum was drawn?

A. Well, yes, I have had occasion to have my memory refreshed that I recall while we were negotiating on this property and prior to the final purchase, we were trying to determine how we would handle this property in the event it was secured, and how we would carry it as none of us wished to put in any additional funds after the initial investment, which was straining the resources of some, and there were various alternatives that were open to us. Now, at the time of the purchase, we thought the Wherry Housing Act would go through and we—

Q. Would you enlarge upon that, you thought the



(Testimony of George W. Williams.)

Wherry Housing Act would go through?

A. The Navy either had under condemnation or was about to file a condemnation and had actually had plans prepared, preliminary plans prepared for an apartment house project which would use 40 or 50 acres of this property, and we were expecting some compensation for that.

Further, in discussing this purchase with the Navy prior to our final signing, it was indicated that the Navy would expect to pay a reasonable value for the property after the termination of the lease, which was to be shortly after our acquisition, and we figured that the return from the lease and the return from the Wherry Housing Act would make it possible for us to carry this property for some time. [121]

Now, there were other possibilities involved. Other people were negotiating for this property. I had been advised confidentially that offers were in excess of the amount that the property had been optioned to us at, and I advised the group that there was a very good possibility, if they wished to hold onto this property even for a comparatively limited period of time, that they might be able to sell it as a whole and realize a capital gain on their investment.

And other possibilities were that if we couldn't make any sale, that some interested parties in the group might wish to attempt some development of some of the property. And in connection with that, why, that memorandum was written.

The sole purpose of the memorandum, so far as I can determine, was to change the interest of Conway

(Testimony of George W. Williams.)

& Culligan in the company that would develop if that particular alternative came to pass.

Q. Change it in what way, Mr. Williams?

A. It would increase their percentage in the property from a sixth to a third.

Q. Was your interest to be changed by this memorandum?

A. Our interest was not affected in any way whatsoever by the memorandum.

Q. Do you have a copy of this memorandum, Mr. Williams?

A. No, sir, I do not.

Q. How many sales of real estate have you personally made, [122] say, in the last 40 years, Mr. Williams?

A. How many sales?

Q. Of real estate have you made in the last 40 years—personally, that is, as an individual?

A. Well, I doubt if I have made over ten in 40 years, and it may be less than that. That's a long time.

Q. Mr. Williams, are the underlying interests of the tenants in common in the land of the same amount or parallel to the shareholding interest in Consolidated Lands?

Mr. Carico: Your Honor, I fail to see the materiality. We are not urging capital contribution on the part of anyone at this time.

The Court: Go ahead.

The Witness: Would you repeat the question, please?

(Testimony of George W. Williams.)

Mr. Brenner: Q. Yes. The percentage ownerships of the underlying interests as tenants in common in the land set out in the documents at such and such a percent, do those same individuals hold exactly the same shareholding interests in Consolidated Lands?

A. Oh, no, absolutely not. The interests were quite different. As a matter of fact, there was a substantial interest in Consolidated Lands that was not in the other property whatsoever.

Q. Where there any interests in the property which were not shareholders in Consolidated Lands? [123]

A. Yes, there were; over twenty-two percent.

Q. Including the plaintiff herein?

A. The plaintiff had no—my daughter had no interest in Consolidated Lands whatsoever.

Mr. Brenner: Your Honor, that concludes my redirect examination.

The Court: All right.

#### Recross-Examination

By Mr. Carico:

Q. Mr. Williams, in referring to this memorandum of April 23, 1953, you stated that other courses of action had been contemplated. A. Yes, sir.

Q. Were any of those reduced to memorandum form?

A. No, they were not. There wasn't any need to, so far as I could determine.

Q. There was a need to reduce this plan of action to memorandum form?

A. Only on the part of Conway & Culligan, who

(Testimony of George W. Williams.)

wanted to be sure that if this course were followed their interest was changed.

Q. Now, you stated that the Navy lease fizzled out, as government leases sometimes do. When did this occur?

A. Well, I would presume that we had advice of that a few months after we secured the property, although we collected [124] on the lease, I guess, for some 20 months or so.

Q. Following the date you acquired the property?

A. Following the date, yes, sir.

Q. Now, with respect to this Wherry Housing activity that was contemplated, that is, in effect, a condemnation proceeding, isn't it, whereby the Government purchases your land?

A. The Government can condemn or it can negotiate, but you have to sell if they determine they want the property.

Q. And you were looking for a certain number of funds to help carry this property from what at that time you hoped would be a Wherry Housing condemnation or sale, is that correct?      A. Yes, sir.

Q. Was this necessary because the property would not carry itself as an investment otherwise?

A. The property, the income from the rental of the bare land, like many farming properties, it won't pay the interest and taxes on it but still it is investment property from the standpoint of its potential. You are correct in your assumption that the property would not carry itself unless the Navy lease continued in existence.

(Testimony of George W. Williams.)

Q. You stated again with reference to this Defendant's Exhibit B, the memo of the San Bruno land, that it does not refer to the petitioner. Does it refer to you as representing the trust for the petitioner?

A. I don't know that it refers to me in that regard. [125]

The Court: Isn't it clear on its face? Can't we look at it?

Mr. Carico: Yes.

The Court: He doesn't have to tell us that.

The Witness: I notice on here, and I—like you say, I don't recall this memorandum too well, but it appears that "trust for children" has been crossed out here. I don't know when it was done or why it was done.

The Court: Are you going to be very much longer with this witness?

Mr. Carico: I think I have about one question more, if I can decipher my notes here, Your Honor.

The Court: That's fine.

Mr. Carico: Q. Mr. Williams, in the light of your next to last statement concerning this property, is it not true that the land that was sold to Consolidated Lands in February of 1954 was not suitable for long-term investment property?

A. Oh, I wouldn't say that. I would say that it had very good potential as a long-term investment. The only trouble with the land was that it had no income possibilities, and to buy it for investment, you had to have some other income to pay the taxes and to

(Testimony of George W. Williams.)

carry that land to realize the appreciation which I thought would occur in the next two or three years.

The Court: Is that your question?

Mr. Carico: That is it, Your Honor. [126]

Mr. Brenner: Your Honor, may I have one more question?

The Court: Yes.

Mr. Brenner: Mr. Williams, when did you first learn that the Wherry Housing project which you had counted on to supply income to carry the land had fallen through?

The Witness: Oh, I can't answer that exactly, but that was almost immediately after the acquisition, as I recall. The thing just folded. The Navy changed its entire policy at about that time and we were left sort of high and dry.

Mr. Brenner: Your Honor, I have no further questions, but at this time I would like to make a motion to submit to the Court a memorandum of points and authorities which Your Honor might like to take under submission.

The Court: All right, with respect to what?

Mr. Brenner: I would like to make a motion to strike Defendant's Exhibit B and just submit a memorandum of points and authorities on the subject.

The Court: You may do that, certainly.

Mr. Carico: Your Honor, I am afraid I do have one further question here.

Q. Mr. Williams, you stated that you were not—or that this property was suitable for long-term investment property.



(Testimony of George W. Williams.)

Mr. Carico: Your Honor, with respect to Defendant's Exhibit G, which we have gone over before, this is the minutes [127] of the Board of Directors' meeting at which Mr. Williams was present.

The Court: We will take it up tomorrow morning, if you wish.

Mr. Carico: It states in here, Your Honor, that the property being sold is "mainly suitable for residential development and not long-term investment." It is directly contrary to his previous testimony.

The Court: Well, that's your statement.

Mr. Carico: May we offer it for the purpose of impeachment, limited to that?

The Court: There is no foundation for that. Is his signature on that?

Mr. Carico: He has examined it and said it is the minutes—this was examined previously, all right.

The Court: All right, you can re-present it tomorrow morning. We will take a recess until tomorrow morning at 10:00 o'clock.

(Adjournment taken to Wednesday, August 24, 1960, at 10:00 o'clock a.m.) [128]

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Morning Session, Wednesday, August 24, 1960—10:00 o'clock A.M.

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The Clerk: Charles and Lois Rosebrook versus the United States of America, for further trial.

Mr. Brenner: Your Honor, I think when we concluded yesterday, Mr. Williams was still on the stand.

The Court: I thought we had finished with him.

Mr. Brenner: I believe counsel was going to submit one more thing which maybe was pertinent to Mr. Williams.

Mr. Carico: There was some question, Your Honor, as to whether Mr. Williams had signed the minutes of the meeting of the American Home Development Company and was present at that meeting. I believe I had already laid the foundation.

The Court: Do you want the witness any further?

Mr. Carico: Yes, I do, if Mr. Brenner seriously has a question. I know he did object on the ground of foundation.

The Court: Pardon me. Do you want the witness present?

Mr. Carico: Yes.

The Court: I was under the impression you had finished with him. In fact, I kept court in session so you would finish with him. If you want him, call him back.

Mr. Carico: Mr. Brenner, is there any real problem about the foundation, because that's the only thing I want.

Mr. Brenner: Your Honor, I would have no objection [129] to him calling him back as long as I can rebut or cross-examine on anything that is brought out.

Mr. Carico: He is your witness, counsel.

The Court: I wish you would make up your mind.

Mr. Brenner: I have finished with him otherwise.

The Court: Are you?

Mr. Carico: I was finished with him until the objection was raised, Your Honor.

(Testimony of George W. Williams.)

The Court: That doesn't answer the question. Are you finished with him or not?

Mr. Carico: I am not finished with him.

The Court: All right, call him up and ask him what you want.

GEORGE W. WILLIAMS,

called as a witness by the plaintiffs, being previously sworn, resumed the stand and testified further as follows:

Recross-Examination (Continued)

By Mr. Carico:

Q. Mr. Williams, you previously testified that you were a director of American Home Development Company, is that correct?      A. Yes, sir.

Q. Were you present at a Directors' meeting on January 27, 1954, at which time the proposed sale of this property to Consolidated Lands Company was discussed?

Mr. Brenner: Your Honor, I am going to object here [130] because I will be objecting to the minutes of the American Home Development Company, and I believe my objection was sustained yesterday so any question in regard to those minutes would also be irrelevant and immaterial with relation to this petitioner at this time.

Mr. Carico: Your Honor, at this time, subject to my questioning, I intend to offer this for the purpose of impeachment. This contains the statements and discussions of the Directors, one of whom was Mr. Williams. It states specifically—

(Testimony of George W. Williams.)

The Court: Are you trying to elicit through these documents something which you claim to be at variance with his testimony?

Mr. Carico: Very definitely, Your Honor.

The Court: Then proceed for that purpose.

Mr. Carico: Q. You may answer the question.

A. I don't recall the date of the meeting, but I was present at a meeting at which that matter was discussed.

Q. Mr. Williams, I direct your attention to Defendant's Exhibit G. Does your signature appear thereon?

A. Yes, sir.

Q. Is that, to the best of your knowledge, the minutes of the meeting of the American Home Development Company at which time this proposed sale to Consolidated Lands was discussed?

A. Yes, sir. [131]

Q. In reviewing that, does that accurately summarize what was discussed between yourself, Mr. Burrows and Mr. Williams, Jr. at that meeting?

A. Yes, sir.

Mr. Carico: Your Honor, I offer Defendant's Exhibit G at this time for the purpose of impeachment.

Mr. Brenner: I will object, Your Honor. There has been no foundation laid for what statements in this are contrary to statements made on the stand.

The Court: Will you please indicate what you claim is contrary to the testimony?

Mr. Carico: Yesterday, Your Honor, Mr. Williams testified that this property that was sold was suitable for a long-term investment. The last sentence on page

(Testimony of George W. Williams.)

I summarizing the discussions between Mr. Williams, Mr. Burrows and another man at the Directors' meeting states that, "The property being sold is mainly suitable for residential development and not long-term investment."

Furthermore, he also testified that this sale was not pursuant to any previous arrangement or plan. However, this same set of minutes also contains the statement, "This sale will accomplish the company's objective when it made the acquisition of all the property; that is, it will only own property which is suitable for investment for the development of commercial establishments on a lease basis," which is at variance [132] with his statement that this was not anything that had been contemplated earlier. Mr. Williams at all times, as I brought out yesterday afternoon, had been a director and officer of American Homes.

The Court: I don't think there is any reason why it shouldn't be admitted for the limited purpose of what effect it may have on the witness' testimony. However, it will not be considered substantive evidence as to what—

Mr. Brenner: May I be heard on this, Your Honor? May I be heard on this? Mr. Williams testified as to what his intent in holding the property was and his purpose for holding the property for long-term investment was. This is a different taxpayer, and what is long-term—

The Court: Pardon me. It is being offered only insofar as the witness has tended to say that it reflects what he discussed with others at this meeting.

(Testimony of George W. Williams.)

Mr. Brenner: I don't think it impeaches him, Your Honor.

The Court: Well, maybe you don't and maybe it doesn't. However, it will be admitted for the limited purpose of what effect, if any, it has on the testimony of the witness. And as you know, an admission for that purpose does not make it competent to support any fact.

Mr. Carico: Your Honor, I might point out one further thing. At the conclusion of the trial, I also intend to offer [133] that, subject to Your Honor's finding that this was a joint venture, which we feel we have proved, as the statement of another joint venturer.

The Court: Then you can re-offer it for another purpose at that time.

Mr. Carico: Right. That will be done at the conclusion of the trial.

That is all the questions I have of the witness.

Mr. Brenner: This having come in, may I ask three more questions?

The Court: Yes.

The Clerk: Defendant's Exhibit G in evidence.

(Whereupon Defendant's Exhibit G for identification was received in evidence, for limited purpose noted.)

#### Further Redirect Examination

By Mr. Brenner:

Q. Mr. Williams, what would be a good long-term investment for you and for other tenants in common?



(Testimony of George W. Williams.)

Would that necessarily be a good long-term investment for some other holder of an undivided interest in the property?

A. Well, a long-term investment that is good for one party might be very injurious to another party.

Q. Would you expand upon that a little, please?

A. Well, for instance, one party might buy a vacant piece of land expecting to hold it for appreciation, and he would be [134] able to take care of the carrying charges and the taxes out of other income, whereas another investor might buy the same piece of land but not have the other income to carry it, and in that event it would be a burden and eventually foreclosed on him.

So for one party it would be a very poor investment and for another party it might be a satisfactory investment. It depends on the objective and the financial condition of the party. This American Home Development Corporation, that corporation had different objectives, for instance, than I personally had in connection with the property.

Q. If American Homes or any other tenant in common had insisted on a different time table in regard to the property, or a different course of action than you did, what would you do in that regard, Mr. Williams?

Mr. Carico: Objection, Your Honor. That is purely a hypothetical question.

The Court: Yes, that is too speculative. He can explain that statement, which he has done.

Mr. Brenner: Q. Mr. Williams, these minutes purport to set out a course of action for American Homes

(Testimony of George W. Williams.)

Development Company. If that did not meet with your personal objective, what would you do in this regard?

Mr. Carico: Objection.

The Court: I don't understand this, frankly. I haven't read that. [135]

Mr. Brenner: The minutes here purport to set out a course of action which seems to the defendant to be binding upon other people in this trial. I want to establish the fact that these minutes and the course of action which American Homes had planned is in no way binding upon the other tenants in common who were owners of this property.

The Court: It's too much for me. Read it again.

(Statement by Mr. Brenner read by the reporter.)

The Court: There is nothing there for me to rule on.

Mr. Carico: May I point out that the—

The Court: You don't have to point out anything. It is just a statement by counsel.

Mr. Brenner: Why, I attempted to phrase it in question form.

The Court: Well, I don't get the question. Rephrase it.

Mr. Brenner: Let me try to rephrase it.

Q. Mr. Williams, did you, as an individual, consider yourself bound by what American Homes stated its course of action and intended purpose was in these minutes?

A. No, sir.

Mr. Carico: Objection, Your Honor.

Mr. Brenner: Q. If there had been a variance be-

(Testimony of George W. Williams.)

tween your intent and purposes, what would you have done—

Mr. Carico: Objection. [136]

Mr. Brenner: Q. —in this regard?

Mr. Carico: It is a hypothetical question.

The Court: Sustained. That is purely speculative. That is not testimony at all.

Mr. Brenner: I have no further questions.

Mr. Carico: I have no further questions, Your Honor.

(Witness excused.)

Mr. Brenner: Your Honor, that closes the plaintiffs' direct case, unless I might recall the plaintiff, Lois W. Rosebrook, for one question.

The Court: All right.

LOIS W. ROSEBROOK,

a plaintiff herein, recalled as a witness in her own behalf, being previously sworn, testified further as follows:

Direct Examination

By Mr. Brenner:

Q. Mrs. Rosebrook, in the period encompassed by the time from May of 1953 to February of 1954, were you acquainted with Mr. Culligan, Mr. Conway or Mr. Wunderlich? A. No, I was not.

Q. Had you ever met them? A. No.

Q. Or ever talked business with them in any regard? A. No.

Mr. Brenner: I have no further questions. [137]

Mr. Carico: I have no questions.

(Witness excused.)

Mr. Brenner: That concludes the plaintiffs' case, Your Honor.

The Court: I believe you made a motion to strike—

Mr. Carico: Yes, I did, Your Honor.

The Court: —the so-called memorandum dated April 23, which is Exhibit what?

Mr. Brenner: "D," Your Honor. In evidence now.

The Court: Defendant's Exhibit D in evidence. The defendant's theory here is that there was a joint venture and that the plaintiff herein was part of it. I am not prepared to state that the record is void entirely of evidence tending to support such an inference, and for that reason the exhibit in question has been admitted in evidence. I am not indicating, however, that I believe the evidence to be sufficient to support a finding that she was part of any joint venture. I am merely pointing this out to show the theory or relevancy upon which the document is admitted, namely, the possible existence of a joint venture or possible agency for this lady on the part of her father. If the Court does not find that there was a joint venture as far as this plaintiff is concerned, that evidence will, of course, be disregarded and ordered stricken from the record.

Mr. Brenner: Your Honor, is my memorandum of points [138] and authorities a part of the record?

The Court: It is.

Mr. Brenner: Thank you, Your Honor.

The Court: In those cases which you cited the evidence was obviously hearsay and incompetent. I am pointing out to you the theory on which it has been admitted in this particular case before us without, I repeat, indicating that the evidence is sufficient to sup-

(Testimony of Frank A. Burrows.)

port any such finding at all. However, if there is any such evidence in the record to support a finding, evidence like this at least becomes relevant to the issue.

Mr. Carico: Do you want anything on that from the defendant in the final brief filed, Your Honor?

(No audible response.)

Mr. Carico: At this time I would like to call Mr. Frank Burrows.

FRANK A. BURROWS,

called as a witness for the defendant, being first duly sworn, testified as follows:

The Clerk: State your name and occupation for the record.

The Witness: My name is Frank A. Burrows, B-u-r-r-o-w-s, President of Williams & Burrows, General Contractors. [139]

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Direct Examination

By Mr. Carico:

Q. Mr. Burrows, you also own an interest in Williams & Burrows, is that correct? A. Yes.

Q. Do you also own an interest in George W. Williams Company?

A. I think you mean G. W. Williams Company.

Q. G. W. Williams Company; I am sorry.

A. Yes, I own stock.

Q. Are you an officer of that company?

A. Yes.

Q. A director of that company? A. Yes.

(Testimony of Frank A. Burrows.)

Q. What type of business was the G. W. Williams Company in in 1953?

Mr. Brenner: Objection, Your Honor. Immaterial to this plaintiff.

Mr. Carico: Your Honor, this question—

The Court: I didn't even hear the question. What was it?

Mr. Carico: The type of business the G. W. Williams Company was in in 1953. It comes in, as Your Honor has stated, where we have made out, I feel, more than a prima facie case. [140]

The Court: I see no objection to it.

Mr. Brenner: Your Honor, G. W. Williams Company wasn't even an owner of an interest in this land. There is no connection or foundation laid whatever.

The Court: What was the name of the father's company?

Mr. Carico: G. W. Williams Company.

Mr. Brenner: But the G. W. Williams Company was not a tenant in common in this land.

The Court: That was the name of the father's business?

Mr. Brenner: Yes.

The Court: There is already some testimony in as to what the business was. Overruled.

Mr. Carico: Q. You may answer the question.

A. The business of G. W. Williams Company is principally in the ownership and development of investment properties.

Q. In 1953 was this true?

A. Yes, it has been—that company has moved in



(Testimony of Frank A. Burrows.)

that direction for the past several years and I think it would include 1953.

Q. Moved in that direction from the home building business originally?

A. Well, originally, prior to the war, the company was in a contracting, construction and home-building business.

Q. Let me clarify that. Let me say for five years prior to 1953? [141]

A. Immediately after the war, in those years the company—well, that company was moving out of the home-building field.

Q. Mr. Burrows, did you join together with Mr. Wunderlich, Mr. Andrew Conway, Mr. George Williams and other groups in corporations which they were representing in purchasing the stock of the San Bruno Land Company in 1953? A. Yes.

Q. And you later took title to a percentage of that land as a tenant in common? A. Yes.

Q. Did you sell your interest in 885 acres of that land to Consolidated Lands Company in February of 1954?

A. I think that was about the time, and I think that was approximately the acreage.

Mr. Carico: May I have Defendant's Exhibit B?

Q. Mr. Burrows, I show you Defendant's Exhibit B, which purports to be a copy of a memorandum entitled "Re San Bruno Lands, Incorporated," dated April 23, 1953. Will you tell me if you identify your initials on pages 1 and 2 thereof?

A. Yes, those are my initials.

(Testimony of Frank A. Burrows.)

The Court: Is this Exhibit D?

Mr. Carico: Exhibit B, Your Honor—"B" for "Baker." It is that disputed memorandum.

I have no further questions at this time, Your Honor.  
[142]

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Cross-Examination

By Mr. Brenner:

Q. Mr. Burrows, do your duties as an officer and director of the G. W. Williams Company and Williams & Burrows primarily concern themselves with real estate?

A. My duties—I will have to split it. My duties with regard to the Williams & Burrows are construction operations. With respect to the Williams Company, those duties as a director are largely in connection with investment properties, development of the same.

Q. What percentage of your time would you allocate to each activity?

A. About 90 percent to Williams & Burrows, 10 percent to the real estate development company.

Q. Would that mean, then, 90 percent to construction and 10 percent to investment real estate activities?

A. Yes.

Q. Mr. Burrows, you were shown the Defendant's Exhibit B and identified your initials thereon. I now show you Defendant's Exhibit B again. Would you tell us if that was the only course of action contemplated by the people who initialed that memorandum?

A. As I recall it—

(Testimony of Frank A. Burrows.)

Mr. Carico: (Interposing.) Your Honor, he may testify to what he may have intended and discussed, but not [143] what other people may have intended.

The Court: He is asking him that.

Mr. Brenner: Q. Was that the only course of action which you personally contemplated in regard to that memorandum when you initialed it?

A. No, that memorandum was prepared on the eve of the purchase of this large piece of land. It was a large undertaking. As far as I was concerned, it was a question of analyzing what might be the prospects and possibilities. The option on the land provided for what appeared to be a very, very reasonable price. The land was partially in farm products and flowers, a large piece was occupied by the Navy, and there were strong discussions with the Navy at the time with respect to a Wherry Act housing project to be built on a piece of this property. From an investment standpoint, it looked like one of those things where you were bound to be able to invest your money and come out with a profit.

The various possibilities of what to do with the land, of course, were numerous. As tenants in common each could partition and take his share. The Navy had not been paying rent under the old arrangement, but was faced with a new arrangement whereby it would either pay fair rental for the property or would condemn the property.

Mr. Carico: Your Honor, if I may interject, this surely is not responsive to the question, "Were any other [144] arrangements contemplated?" I would

(Testimony of Frank A. Burrows.)

like to reserve the right to impeach this witness.

The Court: Go ahead.

Mr. Brenner: Q. Go ahead, Mr. Burrows.

A. Another possibility was further development of the farm land and increase in rentals, which were at the time very nominal. In the path of progress and as a holding for I don't care how long, it certainly looked like it had tremendous advantages to anyone investing in the piece.

This memorandum covered one possible course of action, of which there were these—well, of which there were numerous others, two or three of which I have touched upon.

Q. Do you ever, in your business practice, intend to execute a contract by initialing it?

A. Well, in practice many of our arrangements, particularly in the construction business, are even done verbally. By initialing a memorandum or a bid, whatever the case may be, you have the means of identification and the means of serving memory in the event some time has elapsed. I have no—I would presume that if we followed the course of action as outlined here, that this indicated what each of the parties would do, if that course of action were followed.

Q. Do you know at whose suggestion this memorandum, which is Exhibit B, was drawn up?

A. Yes, I do. In trying to work out this group of [145] investors, Conway & Culligan had the smallest share. If this course were followed—

Mr. Carico: Objection. This is not responsive to counsel's question of asking who suggested it be drawn up. The answer is Conway & Culligan.

(Testimony of Frank A. Burrows.)

Mr. Brenner: He can answer more than two words, Your Honor. This is part of his answer.

Mr. Carico: It is also outside the scope of my direct examination. All I asked him was if those were his initials.

The Court: Overruled. Go ahead.

Mr. Brenner: Q. You may answer.

A. Conway & Culligan, in the purchase, had the lesser share than the other groups. If this course of action were adopted, they felt they could foresee that they would be called upon for more activity, more work, than if they held it purely as an investment. Then in that event they wanted to be able to participate equally with the other groups. That's what this memorandum, I think, purports to set up.

Q. Did this memorandum concern you in any way, in your opinion?

A. (No audible response.)

Q. Let me rephrase it. Did it concern your percentage participation in any way?

A. Yes, my percentages are—well, in the over-all, the [146] Williams & Burrows group's percentage was not changed by the memorandum.

Q. Do you have a copy of this memorandum?

A. I don't know, but I might well have.

Q. In the period encompassed from May of 1953 to February of 1954, did you know the plaintiff herein, Lois W. Rosebrook?

A. Yes.

Q. Have you ever talked business with her?

A. No.

(Testimony of Frank A. Burrows.)

Mr. Brenner: I have no further questions, Your Honor.

Redirect Examination

By Mr. Carico:

Q. Mr. Burrows, were any other memorandums prepared as a result of your meeting?

A. I don't know.

Q. Was this memorandum not prepared by a Mr. Depaoli, an attorney?

A. Mr. Depaoli? Not that I know of.

Q. Do you know who did prepare it?

A. It was probably prepared by Mr. Crane, but I don't know. The purpose of preparing it—

Q. I understand.

A. (Continuing.) This had to do with a change in the relationship of the parties involved.

Mr. Carico: I move to strike that as a volunteered statement. [147]

The Court: Strike it out. Go ahead, please.

Mr. Carico: Q. You are an attorney, also, are you not, Mr. Burrows?

A. I am a member of the bar, yes.

Q. You mentioned something with respect to a contemplated Wherry Housing deal. A Wherry Housing condemnation is, in fact, a sale, is it not?

A. A Wherry?

Q. Yes. A Wherry Housing deal. That would, in fact, constitute a condemnation sale? A. Yes.

Q. So you were anticipating receiving money from the sale of the property and not anything generated as income from the property, is that not correct?



(Testimony of Frank A. Burrows.)

A. Well, there is a possibility of a Wherry Act condemnation.

Q. And that would generate money by a sale rather than income as you normally think of rents and profits from the land, is that correct?

A. That is correct.

Mr. Brenner: I have no further questions.

(Witness excused.)

Mr. Carico: Your Honor, I call Thomas J. Culligan, Jr., under Rule 43(b). [148]

The Court: What is Rule 43(b)?

Mr. Carico: As an adverse and hostile witness. As Your Honor saw from Mr. Burrows, Mr. Culligan, Mr. Burrows, Mr. Williams, are all involved in this transaction. They either have now or have had a problem with the Internal Revenue Service on this same sale in question. I think Your Honor is well aware, from my one question as to the initial on this Exhibit B, counsel turned Mr. Burrows on, brought in things and, in effect, made him his own witness, and under the circumstances, I think it would be manifestly unfair for the Government to be bound by their testimony.

The Court: All right, proceed.

THOMAS J. CULLIGAN, JR.,

called as an adverse witness by the Government under Rule 43(b), being first duly sworn, testified as follows:

Mr. Brenner: First of all, Your Honor, may I be heard on this Rule 43(b)?

The Court: No. Go right ahead. If it comes up, I will rule on it.

(Testimony of Thomas J. Culligan, Jr.)

The Clerk: Please state your name and occupation for the record.

The Witness: My name is Thomas J. Culligan, Jr., executive officer of various corporations. [149]

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Direct Examination

By Mr. Carico:

Q. Mr. Culligan, do you presently maintain an office in the Peninsula where you hold out yourself to be a builder, developer and general contractor to the general public?

Mr. Brenner: Your Honor, I am going to object to this question as leading. I have no knowledge that this witness is a hostile witness.

The Court: Neither have I. Go ahead. Sustained. Reframe the question.

Mr. Carico: Q. Mr. Culligan, you are aware, are you not, that this case involves the sale of an interest in the old San Bruno Lands to Consolidated Lands Company?

A. Well, in the subpoena it didn't say what I was coming here for.

Q. In February of 1954 you did sell an interest in such lands to the Consolidated Lands Company?

A. My interest, you mean?

Q. Your interest, yes.

A. Yes.

Q. Do you presently have a case pending in the Appellate Division of the Internal Revenue Service involving whether that sale constituted capital gain or ordinary income?

(Testimony of Thomas J. Culligan, Jr.)

A. Not to my knowledge. It might be. I really don't know. I turn these matters over to my attorney. [150]

Q. Your attorneys have not discussed any such pending discussion with you?

A. No, I haven't discussed it.

Q. Mr. Culligan, your attorney is Max Weingarten, is he not?      A. Correct.

Q. Were you not present when Mr. Weingarten, before Mr. Lyons, the Appellate Section, involving this particular transaction I just asked you about, approximately two months ago—

A. Would you please mention the question again? I couldn't follow you.

Q. Were you and Mr. Weingarten before Mr. Lyons of the Appellate Section of the Internal Revenue Section approximately two months ago concerning the sale of your interest and the treatment of the gains from the sale of your interest in the San Bruno Lands to Consolidated Lands Company?

A. No, I have never appeared with Mr. Weingarten in any matter.

The Court: Can't we proceed with the examination of the witness? If he proves to be unwilling or hostile to you, I will deal with the situation.

Mr. Carico: All right, Your Honor.

The Court: Go ahead.

Mr. Carico: Q. Mr. Culligan, you mentioned that you are an executive of various corporations. Do you own an interest in Conway & Culligan Development Company? [151]

A. No more.

(Testimony of Thomas J. Culligan, Jr.)

Q. Did you in 1953 and 1954?

A. That was just about the year that the corporation was dissolved. I don't know the exact date.

Q. And Conway & Culligan Development Company bought land, subdivided it and sold it prior to—

A. (Interposing.) It was a corporation.

Mr. Brenner: Objected to, Your Honor. This is immaterial and irrelevant as to this plaintiff.

The Court: I just suggested he get along and question him and go ahead, and I presume he is doing so.

Mr. Carico: It comes in the same as it has on the others, Your Honor.

Mr. Brenner: Your Honor, what Conway & Culligan did has no—

The Court: I don't know yet. I am just listening. Go ahead, counsel.

Mr. Carico: Q. Did you also at one time own an interest in Hillcrest Gardens, Incorporated?

A. Hillcrest Gardens? Yes. It was a corporation set up for the purpose of building homes.

Q. And selling them?

A. And selling homes, yes.

Q. What about Rawlston Construction Company?

A. Rawlston was a corporation set up for the purpose of [152] constructing homes.

Q. In that connection or in connection with all of these previous corporations, did your activities constitute examining land before purchasing and supervising the development thereof?

Mr. Brenner: I will object, Your Honor. We are getting immateriality upon immateriality now.

(Testimony of Thomas J. Culligan, Jr.)

The Court: He has already testified that they were in the business of subdividing and home building. I don't know what he wants now. Go ahead.

Mr. Carico: Q. Did your activities in connection with these various corporations encompass examining and purchase of lands and the supervision and development thereof?

A. As an officer of the corporations, yes.

Q. And you were, I believe, involved in the original purchase of the San Bruno Lands Company sometime in May of 1953.

A. That was the original purchase?

Q. Yes. A. Yes.

Q. Do you have a real estate license, Mr. Culligan?

A. Yes, sir.

Q. Do you know a Mr. Andrew Conway?

A. Andrew Conway? Yes, I do.

Q. Do you know of your own personal knowledge if Mr. Conway was involved in the acquisition of the San Bruno Lands?

A. I believe he was, yes. [153]

Q. Do you know of your own personal knowledge if Mr. Conway sold his interest in a portion of such land to Consolidated Lands Company in 1954?

Mr. Brenner: Your Honor, I have to record my objection here. I don't see that it hurts us, but it is completely irrelevant.

The Court: Well, then why worry about it? Overruled. It's in already.

Mr. Carico: The problem, Your Honor, is that Mr. Conway is out of the state on vacation or we would have called him.

(Testimony of Thomas J. Culligan, Jr.)

The Court: There's no problem. It will be purely cumulative, I assume.

Mr. Carico: Yes, it would.

The Witness: Yes, he did.

Q. Do you know of your own personal knowledge if Mr. Conway owned an interest in Conway & Culligan Development Company in 1953?

A. The original corporation?

Q. Yes. A. Yes.

Mr. Carico: I have no further questions.

Mr. Brenner: I have no questions whatever, Your Honor.

The Court: What is the significance of this testimony? [154]

Mr. Carico: Your Honor, this comes into one of the tests that is normally set up of circumstantial evidence indicating their intent. If these men either on their own behalf or the partnership or corporation are interested in development of land—

The Court: You are establishing now that Conway & Culligan were in the business of acquiring lands for subdivision and the construction and sale of lots, is that right?

Mr. Carico: Yes, and that these men were principal stockholders, officers and directors and were involved in the real estate business primarily.

The Court: I imagine that could have been stipulated to, if you asked for it.

Mr. Carico: Counsel has refused to stipulate.

The Court: Do they claim that they are not engaged in the buying and selling of property in the ordinary course of business?



(Testimony of Thomas J. Culligan, Jr.)

Mr. Carico: He considers it irrelevant. It is an opinion he is entitled to. We have an opposite opinion.

The Court: Who is "he"?

Mr. Carico: Mr. Brenner.

The Court: All right, that's enough. Thank you very much.

(Witness excused.)

Mr. Carico: Your Honor, the defense's case is closed. [155]

The Court: All right, anything further?

Mr. Brenner: Does Your Honor desire oral closing arguments?

The Court: Yes, I would like to hear from you and see if you can pull this thing together.

Mr. Carico: I am sorry, Your Honor, I over-anticipated myself. As I stated to Your Honor a few minutes ago with reference to Defendant's Exhibit G, which is the minutes of the special meeting of the board of directors—

The Court: Yes, I understand. What do you want to do about it?

Mr. Carico: I wish to offer this exhibit as substantive evidence at this time, Your Honor, contingent upon Your Honor's finding that this was a joint venture, as the statement of one joint venturer, which, under the hearsay rule or any rule of evidence, is admissible as against any other joint venturer, both on behalf of the individuals who made the statement and on behalf of American Home Development Company, which itself is a member of the joint venture.

The Court: All right, the offer to introduce it in evidence is submitted. I presume you object to it?

Mr. Brenner: May I record my objection?

The Court: Your objection will be noted.

Mr. Brenner: It is on the basis that no foundation has been laid yet for the establishment— [156]

The Court: I understand, and your objection will be noted and it will stand submitted.

All right, suppose we take a five-minute recess and then we will see what you have to offer.

(Short recess.) [157]

\* \* \* \* \*

[Endorsed]: Filed Sept. 29, 1960

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[Endorsed]: No. 17387. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Charles E. and Lois Rosebrook, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: May 26, 1961.

/s/ FRANK H. SCHMID,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit

No. 17387

UNITED STATES OF AMERICA,

Appellant,

vs.

CHARLES E. ROSEBROOK and LOIS ROSE-  
BROOK,

Appellees.

DESIGNATION OF RECORD

The Appellant, United States of America, designates the following portions of the record on appeal to be printed:

1. Complaint filed December 18, 1959.
2. Answer filed February 11, 1960.
3. Partial Stipulation of Facts filed August 23, 1960, (a copy of which was also introduced in evidence by the plaintiffs) with the exception of the exhibits thereto which are to be excluded by stipulation and order of the Court.
4. Page 37, line 10, through Page 157, line 5, inclusive, of the reporter's Transcript of Proceedings of Trial filed September 29, 1960.
5. Memorandum and Opinion filed October 19, 1960.
6. Findings of Fact and Conclusions of Law filed January 3, 1961.
7. Judgment for Plaintiffs on Findings of Court filed January 3, 1961.
8. Notice of Appeal filed March 2, 1961.

9. Designation of Contents of Record on Appeal filed March 2, 1961.

10. Order Extending Time to file record and docket appeal filed April 7, 1961.

11. Statement of Points on Appeal filed contemporaneously herewith.

12. Stipulation re printing of exhibits filed contemporaneously herewith and any Order based thereon.

13. This Designation of Record.

Dated: June 12, 1961.

LAURENCE E. DAYTON

United States Attorney,

RICHARD L. CARICO,

Assistant United States Attorney,

/s/ By RICHARD L. CARICO.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 12, 1961. Frank H. Schmid,  
Clerk.

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[Title of Court of Appeals and Cause.]

#### STATEMENT OF POINTS ON APPEAL

The Appellant, United States of America, hereby adopts the following as its concise statement of points which will be relied upon on appeal:

1. The District Court erred in holding that the Appellee, Lois Rosebrook, was not a dealer in real property.

2. The District Court erred in holding that the Appellee, Lois Rosebrook, did not hold her interest in 884.2 acres of land located in San Bruno, California.

primarily for sale to customers in the ordinary course of a trade or business.

3. The District Court erred in holding that the interest of the Appellee, Lois Rosebrook, in 884.2 acres of land located in San Bruno, California, was a capital asset as defined in Section 1221 of the Internal Revenue Code of 1954 (68A Stat. 321).

4. The District Court erred in holding that the Appellee, Lois Rosebrook, properly reported gain realized upon sale of her interest in 884.2 acres of land in San Bruno, California, as capital gain.

Dated: June 12, 1961.

LAURENCE E. DAYTON,

United States Attorney,

RICHARD L. CARICO,

Assistant United States Attorney,  
Attorneys for Appellant,

/s/ By RICHARD L. CARICO.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 12, 1961. Frank H. Schmid,  
Clerk.

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[Title of Court of Appeals and Cause.]

### STIPULATION

It is stipulated that all exhibits introduced at the time of trial of the captioned case, including those introduced as a part of the Partial Stipulation of Facts, may be considered in their original form without printing, provided, however, that counsel for the respective parties

may print such portions of the exhibits as they consider pertinent in appendix to the briefs.

Dated: June 12, 1961.

LAURENCE E. DAYTON,  
United States Attorney,  
RICHARD L. CARICO,  
Assistant U. S. Attorney,  
/s/ By RICHARD L. CARICO,  
EUGENE J. BRENNER,  
HARRY L. FREEMAN,  
JANIN & MORGAN,  
Attorneys for Appellees.  
/s/ By EUGENE J. BRENNER,

So ordered:

/s/ RICHARD H. CHAMBERS,  
Circuit Judge.

June 12, 1961.

[Endorsed]: Lodged June 12, 1961. Filed June 13,  
1961. Frank H. Schmid, Clerk.